No. 89-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

C. VERNON MASON,

Petitioner,

—v.—

Departmental Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department; Office of Chief Counsel,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Stephanie Y. Moore
666 Broadway, 7th Fl.
New York, New York 10012
(212) 614-6464

William M. Kunstler*
Ronald L. Kuby
13 Gay Street
New York, New York 10014
(212) 924-5661

* *Counsel of Record for Petitioner*

QUESTIONS PRESENTED

I. Whether this Court's decisions in Kugler v. Helfant, 421 U.S. 117 (1975) and Gibson v. Berryhill, 411 U..S. 564 (1973) precluded dismissal of petitioner's Complaint on abstention grounds where he had made a prima facie case of bias and defendants had introduced no contrary evidence.

II. Whether the New York State Attorney General's public dissemination of allegations of professional misconduct against petitioner in the controversial and racially sensitive case of Tawana Brawley deprive him of his rights to due process and undermine his right to a fair and impartial tribunal.

III. Whether Petitioner's Complaint Satisfied the Bad Faith, Harassment, and/or Extraordinary Circumstances Exceptions to Younger Abstention.

PARTIES

Petitioner C. Vernon Mason, Esq., is a prominent Black civil rights and criminal defense attorney licensed to practice law in the courts of the State of New York.

Respondents Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department [hereinafter "DDC," "Disciplinary Committee," or "the Committee"] is an arm of the Appellate Division of the Supreme Court for the First Judicial Department [hereinafter "The Appellate Division"], and is charged, pursuant to 22 N.Y.C.R.R. § 603.4 with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys to whom the rules apply, and to impose discipline to the extent authorized by § 603.9 of the Rules.

Respondent Office of Chief Counsel to the Disciplinary Committee consists of the chief counsel, deputy chief counsel and other staff counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

C. VERNON MASON,

Petitioner,

- v. -

DEPARTMENTAL DISCIPLINARY COMMITTEE,
APPELLATE DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK,
FIRST JUDICIAL DEPARTMENT;
OFFICE OF CHIEF COUNSEL,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner C. Vernon Mason respectfully prays that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals for the Second Circuit (set forth at pages A-1 to 9 of the Appendix to this Petition) is reported at 894 F.2d 512 (2d Cir. 1990). The opinion of the United States District Court for the Southern District of New York (Sprizzo, J.) (set forth at pages A-10 to 17) is unreported.

JURISDICTION

The court of appeals issued its judgment and opinion on January 16, 1990 (A-18). A motion, pursuant to Supreme Court Rule 29.2, for an extension of time to file this petition was granted to and including May 10, 1990, by Mr. Justice Marshall on April 9, 1990, Application No. 90-695. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS

Section 1983 of Title 42 of the United States Code ("Section 1983" or "§ 1983") is set forth at page A-19 of the Appendix. Judiciary Law § 90(10) is set forth at page A-20 of the Appendix. 22 N.Y.C.R.R. §§ 603.4, 603.5 and 603.9, are set forth at pages A-21 to 24 of the Appendix.

STATEMENT OF THE CASE

A. Introduction

This lawsuit involves the fundamental right to have allegations of misconduct against petitioner considered and resolved before a fair and impartial tribunal. Moreover, the issues raised herein strike at the very heart of the integrity of the attorney disciplinary machinery for the State of New York, particularly in situations involving controversial causes. Petitioner maintains that both the district

court and the court of appeals for the Second Circuit improperly and exclusively focused on the nature of the allegations against him while ignoring compelling evidence against the disciplinary machinery of the state of New York of its inability to fairly and impartially adjudicate those allegations, as well as petitioner's federal due process claims.

B. Factual Background

In November 1987, Tawana Brawley, a young Black Wappingers Falls teenager was discovered outside of her old residence in a semi-conscious state. The fifteen year old child, who had been missing for four days, was lying inside a garbage bag in a fetal position with excrement and racial epithets smeared and scrawled over her body. Specifically, the words "KKK" and "NIGGER" were written on Ms. Brawley's

chest, torso and clothing. Ms. Brawley alleged that she had been abducted and sexually assaulted by several white men, one of whom displayed a policeman's badge.

Sometime thereafter, petitioner C. Vernon Mason, Esq., together with fellow attorney Alton H. Maddox, Jr., [1] entered the case as legal advisers to Ms. Brawley. At their prompting, Governor Mario Cuomo agreed to appoint a special prosecutor to investigate Ms. Brawley's allegations of rape and abduction. On January 26, 1988, Governor Cuomo appointed the Attorney General of the State of New York, Robert

---

[1]Mr. Maddox is an attorney admitted and practicing in the Second Judicial Department of the state of New York. Complaints of professional misconduct against Mr. Maddox are considered by the Grievance Committee for that Department.

Abrams, to assume that role.[2] Messrs. Mason and Maddox publicly opposed the selection of the Attorney General challenging his competency in criminal law and criticizing his lack of trial experience.

In late February 1988, Attorney General Abrams empaneled a Grand Jury to investigate Ms. Brawley's charges. Over the next seven months, various developments in the investigation of the Brawley incident repeatedly captured the headlines of every major newspaper in New York City and was widely reported by local and national broadcast media. During this period, Messrs. Mason and Maddox constantly challenged the integrity, thoroughness and

---

[2]Prior to the appointment of Attorney General Abrams, two previously selected prosecutors -- William Grady and David Sall -- resigned citing unspecified conflicts-of-interest.

fairness of the Attorney General's investigation.[3] In addition, the Brawley family withheld their cooperation from the Attorney General and his staff.

At the conclusion of the controversial investigation, the Grand Jury issued a report in which it found that it had been presented "no evidence that any sexual

---

[3]An assortment of incidents gave rise to the concerns of Messrs. Mason and Maddox: (1) subsequent to the withdrawal of the two local prosecutors but prior to the empaneling of the Abrams' grand jury, a former printer in the Attorney General's office was arrested on charges of stealing a transcript of the testimony from the first grand jury; (2) hospital photographs of Ms. Brawley in a partially nude state were broadcast on local and national television; (3) a self-styled "surveillance expert," Samuel McClease, emerged with a fabricated tale of evidence that Ms. Brawley's advisers were perpetrating a "hoax"; (4) Glenda Brawley, Tawana's mother, was subpoenaed to testify before the grand jury although others who Mason and Maddox urged be subpoenaed were not; and (5) confidential grand jury material was leaked to the New York Times prior to the issuance of the Grand Jury's Report.

assault occurred." The Report was released to the public on October 6, 1988 at a mammoth press conference convened by the Attorney General. In addition, the Attorney General announced that he was filing a grievance against Ms. Brawley's attorneys and disseminated over two-hundred copies of his ten-page complaint to the media. The text of that complaint was published the following day in the New York Law Journal.[4]

C. The Committee Investigation and State Court Proceedings

1. Initial Stages of the Committee Investigation.

By letter dated October 14, 1988, petitioner was directed by the Departmental

---

[4]The New York Law Journal is a daily business day publication. The Law Journal publishes the court calendars of each judicial division and, consequently, is consulted by judges and lawyers throughout the State.

Disciplinary Committee to respond within twenty days to the Attorney General's allegations of professional misconduct. Enclosed with the letter was a copy of the ten-page complaint of the Attorney General, accompanied by thirty-eight exhibits, and a copy of the 170-page report of the Grand Jury.

Subsequent to service of the October 14 letter, Mr. Mason twice sought and was twice denied a reasonable extension of time in which to respond to the lengthy complaint of the Attorney General. Accordingly, on November 4, 1988, a timely response to the allegations of misconduct was submitted on Mr. Mason's behalf. Mr. Mason subsequently made a request to withdraw that response and to file anew pending his efforts to secure permanent counsel and to obtain and review the

minutes of the Grand Jury of Dutchess County.[5]

This request triggered a flurry of correspondence between the DDC and then-recently retained counsel herein, which culminated in the filing of Mr. Mason's first Article 78 petition with the Appellate Division seeking relief from the arbitrary actions of the Committee.[6] In

---

[5]Application for disclosure of the grand jury minutes was made on December 5, 1989 and denied by order dated February 21, 1989. A motion to renew the disclosure motion was subsequently filed as a result of the controversy within the First Department, see supra. The motion to renew was granted, however, the Court adhered to its original decision denying access. Petitioner has noticed his appeal of that decision.

[6]Specifically, appellant sought a reversal of the DDC's decisions (1) denying his request for an extension of time in which to respond to allegations of professional misconduct made by Attorney General Robert Abrams, and (2) refusing to allow Stephanie Y. Moore, Esq., an attorney admitted to practice in the State of Pennsylvania, the United States District

response to Mr. Mason's mandamus petition, the Committee cross-moved, dismissal. In support of the cross-motion, then-Chief Counsel of the DDC, Michael A. Gentile submitted an Affirmation. Attached as an Exhibit to Mr. Gentile's Affirmation was a letter written by Mr. Gentile to the Attorney General during the pendency of the grand jury investigation into Tawana Brawley's disappearance. See A- 43. The letter advised the Attorney General, who was then serving as the special prosecutor to the grand jury investigating Ms. Brawley's charges, that the DDC had commenced an investigation of Mr. Mason in

---

Court for the Eastern District of Pennsylvania, and the United States Courts of Appeals for the Third and Fourth Circuits, to proceed on his behalf. Associated with New York Counsel, Ms. Moore had previously represented Mr. Mason before the Committee on an unrelated matter without incident.

connection with his representation of Ms. Brawley. Mr. Gentile expressed interest in certain "information, statements and documents which would be relevant to [the Committee's] inquiry," and specifically solicited receipt of "any evidentiary materials presently available" to the Attorney General and his office.[7] The letter further assured the Attorney General that the Disciplinary Committee would "not take any steps at th[at]] time" but would "await the outcome of the grand jury's inquiry before proceeding further." Finally, the letter requests the Attorney General's "immediate assistance and cooperation" to facilitate the Committee's

---

[7]The Second Circuit's characterization of the letter from Mr. Gentile to Attorney General Abrams, to-wit, that it "requested that relevant materials be produced after the Grand Jury completed its work," see A5, is clearly in error. Mr. Gentile sought immediate production of any such materials.

"preparation for possible future action."

Upon discovery of the letter,[8] Mr. Mason filed a second Article 78 petition charging, in effect, prosecutorial misconduct, and seeking an order directing the Committee (1) to dismiss the Attorney General's complaint, against him and/or (2) to grant him discovery to determine, the nature and details of all communications between Mr. Gentile and the Attorney

---

[8]In December 1988, prior to his discovery of the Gentile letter to the Attorney General, Mr. Mason had independently lodged a formal complaint of misconduct against Attorney General Abrams. Among other things, Mr. Mason charged that the Attorney General's public dissemination of his complaint was in flagrant disregard of the rules of the DDC and constituted a violation of the Lawyer's Code of Professional Responsibility in that it was, inter alia, intentionally calculated to interfere with the orderly and impartial functioning of the Committee. The Committee dismissed Mr. Mason's complaint against Attorney General Abrams on June 30, 1989, advising Mr. Mason "that the matter remains confidential pursuant to Judiciary Law § 90(10) and 22 N.Y.C.R.R. § 605.24."

General concerning his representation of Ms. Brawley that occurred from the date of Mr. Gentile's letter up to the time that he was served with the Attorney General's complaint.[9] Chief among Mr. Mason's concerns articulated to the court was (1) whether the pending Grand Jury investigation into Ms. Brawley's charges had been deliberately skewed by the Attorney General in order to retaliate against Mr. Mason for his public criticisms of the Attorney General and further to enhance the possibility of securing disciplinary sanctions, and (2) whether confidential grand jury material had been unlawfully disseminated between the two

---

[9]Disposition of Mr. Mason's applications before the Appellate Division resulted in the denial of the central relief requested. Request for further relief was effectively denied by the Court of Appeals which refused to grant leave to appeal the orders of the Appellate Division.

offices.

2. Public Allegations of Official Misconduct In the Investigation of the Attorney General's Complaint Against Mr. Mason.

One day after Mr. Mason's discovery of the Mr. Gentile's letter to the Attorney General, a local newspaper reported that Mr. Gentile had resigned his post as Chief Counsel to the DDC effective February 1, 1989. At that time, Mr. Gentile's resignation was attributed solely to issues having nothing to do with Mr. Mason. Subsequently, however, while Mr. Mason's Article 78 petitions were still pending before the Appellate Division, two new published accounts, reported for the first time that there were allegations of official misconduct with respect to the DDC's investigation of Mr. Mason. Specifically, following Mr. Gentile's sudden resignation prominent members of the

New York legal community intimated that Mr. Gentile and his deputy counsel, Sarah Diane McShea, had been forced out by Presiding Justice of the Appellate Division, and demanded an explanation. In response to those demands, Presiding Justice Francis T. Murphy issued a public statement reprinted in the New York Law Journal, in which he acknowledged that he had requested Gentile and McShea's resignations and further maintained that

> reports of the absence and non-productivity of Mr. Gentile caused me concern upon the filing with the DDC in October of 1988 of the complaints of the Attorney General of the State of New York against C. Vernon Mason in the Brawley case, a filing that was made public in an extensive release to the press. Upon that filing, Mr. Gentile repeatedly informed the Clerk of the Court that he, Mr. Gentile, was frightened by the prospect of the Mason matter that he was inclined to find a way of avoiding it. Indeed, Mr. Gentile had the cases [sic] assigned not to himself but

> to a DDC attorney who was told in fact that the attorney would have nothing to do with it.

Mr. Gentile counter-charged that Justice Murphy wanted him to charge Mason "'right off the bat.'"[10] According to Mr. Gentile, "Judge Murphy's interference was aimed at thwarting . . . efforts to assure that Mason received the same due process afforded any lawyer facing charges of serious misconduct." Mr. Gentile also maintained that "'a fair reading' of the Mason case . . . 'will show that Judge Murphy and [his Chief clerk, Harold J.] Reynolds . . . tried to cover up their interference by casting aspersions [on Mr. Gentile and Ms. McShea.]'" Finally, Mr.

---

[10]Formal charges are generally preceded by Committee investigations to afford the subject attorney an opportunity to respond to allegations of misconduct and to determine whether such charges are warranted.

Gentile rebuked the Justice for "open[ing] up to the public view a pending matter."

Thereafter, Mr. Gentile and Ms. McShea reportedly filed a disciplinary complaint against Justice Murphy with the State Commission on Judicial Conduct, charging that Justice Murphy and his Chief Clerk Harold J. Reynolds[11], "us[ed] the committee as a tool of personal vengeance and gain and to exercise political power in favor of friends and against political enemies." Further, they repeated their allegations that Justice Murphy improperly interfered in the investigation of disciplinary complaints, including that of the Attorney General against Mr. Mason.

Subsequent newspaper accounts

---

[11]On or about March 3, 1989, Mr. Reynolds resigned amid allegations that he personally interfered with two high profile disciplinary investigations that had since been closed.

suggested that the State Commission on Judicial Conduct issued a letter of caution to Justice Murphy. Because the proceedings of the State Commission are confidential, however, the scope of the charges and any investigation thereof are unknown. In addition, because letters of caution are private and not considered as discipline, the contents of such a letter to Justice Murphy, if any, is similarly unknown to petitioner.

Following the airing of allegations between Mr. Gentile and Justice Murphy, Mr. Mason filed an addendum to his then-pending Article 78 petitions again seeking an end to the Committee's investigation of his role in the representation of Ms. Brawley. Mr. Mason charged that the conduct of Mr. Gentile and Justice Murphy had totally undermined his rights to due process and

unalterably compromised his right to a fair and impartial tribunal.

3. The Intervention of New York Court of Appeals.

On February 16, 1989, following the exchange of charges by Gentile and Murphy, the Chief Judge of the Court of Appeals, Sol Wachtler, in a public release in the New York Law Journal instructed the Appellate Division as a "collective body" to "make any necessary inquiry and take such appropriate actions as may be necessary to restore the actuality and perception of order, respect and integrity necessary to the discharge of its important duties, including especially those pertaining to the DDC." The response to Chief Judge Wachtler's directive came in the form of an internal investigation of the Appellate Division by the Appellate Division. Published accounts reported

dissatisfaction with the probe both by the judges of the Appellate Division and members of the DDC. Published accounts further indicated that the testimony of the witnesses appearing before the justices was unsworn. Justice Murphy's own testimony -- which was critical to the underlying issues -- was heard in a session described by an unnamed source as "'not too rigorous.'"

D. The District Court Proceedings

On May 23, 1989, Mr. Mason filed a federal complaint in the Southern District of New York seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Mr. Mason alleged violations of his rights secured by the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983, and sought an order preliminarily and

permanently enjoining the DDC from proceeding upon the complaint filed against him by the Attorney General of the State of New York. The complaint alleged that (1) the publication of the disciplinary Complaint against Mr. Mason by the Attorney General and the ensuing improprieties within and between the Appellate Division and the DDC jointly and severally deprived Mr. Mason of his rights to due process and on impartial tribunal, (2) the DDC's solicitation and investigation of the Attorney General's complaint was in bad faith and/or derogation of Mr. Mason's right to due process, and (3) the DDC's solicitation and investigation of the Attorney General's complaint was designed to harass Mr. Mason and in retaliation for his exercise of First Amendment freedoms.

In its order entered on August 21,

1989, the district court denied Mr. Mason's motion for a preliminary injunction and dismissed his complaint citing Younger v. Harris, 401 U.S. 37 (1971). Having conducted no evidentiary hearings, the court held that Mr. Mason "failed to show that he cannot fairly raise his constitutional claims in the State proceedings, and ... failed to show the bad faith or extraordinary circumstances necessary to make Younger abstention inappropriate." See A-34.

E. The Proceedings Before the Second Circuit

Following the district court's decision, Mr. Mason sought a stay enjoining enforcement of its order and the underlying disciplinary proceedings pending appeal. That motion was denied. He filed an emergency motion for a stay pending appeal with the Second Circuit. Following a

hearing on the motion, a panel of the Second Circuit granted Mr. Mason's request for a stay and expedited the briefing and argument on the merits. During argument on the merits, a second panel of the Second Circuit invited and granted an oral application by counsel to the DDC to lift the previously imposed stay. Thereafter, on January 16, 1990, the Second Circuit issued its opinion affirming the decision of the district court, holding that the district court "was entirely correct in its conclusion that Mason's complaint did not require an evidentiary hearing and that the complaint should be dismissed."[12]

---

[12]Both the district court and the Court of Appeals suggested that Mr. Mason's remedy to avoid investigation by a biased tribunal was to seek removal to another venue. Following the order of the Court of Appeals lifting the stay of Mr. Mason's compelled participation in the DDC's investigation, Mr. Mason duly sought a change of venue to the Second Department

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit is premised upon a faulty interpretation of this Court's prior decisions on the disability of tribunals by reason of bias, and further misperceives the standards applicable to the presentment of a prima facie case of unconstitutional bias. Central to the principles underlying the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), and its progeny is a security that federal claims can be properly raised and timely decided by a competent state tribunal. See Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Consequently, where no such opportunity to adjudicate federal claims exists, neither

---

which was considering identical charges against Mr. Maddox. Mr. Mason's application was opposed by the DDC and denied by the Appellate Division without opinion.

the Younger abstention doctrine nor the policies favoring deferral to state proceedings apply.

The Second Circuit's determination that whether the DDC declines to consider the misconduct of others and, implicitly, the direct effect of that misconduct on the Committee's operations, see A___, is irrelevant to the propriety of the Committee's investigation of Mr. Mason misses the point and effectively denies him a forum in which to present and have adjudicated his federal claims of bias. An adverse resolution of petitioner's claim that the underlying disciplinary investigation is retaliatory or otherwise brought in bad faith does not foreclose his claim that the DDC is unconstitutionally biased to consider such allegations.

The Second Circuit's further

conclusion that Mr. Mason has adequate redress in the state judicial system similarly does not comport with the fundamental right to be tried, in the first instance before an impartial tribunal. See Gibson, 411 U.S. at 577; Wichert v. Walter, 606 F. Supp. 1516, 1522 (D.N.J. 1985) ("nothing requires the court to defer to state proceedings until the plaintiff's case eventually finds its way to an unbiased tribunal within the state system."). Because the Second Circuit's decision improperly insulates the conduct of state officials from immediate review and further requires no rebuttal of compelling evidence of bias within the state's disciplinary machinery, a writ of certiorari should be granted.

I. THE DECISIONS OF THE COURT OF APPEALS IS DIRECTLY AT ODDS WITH THIS COURT'S PRIOR DECISIONS RECOGNIZING THE PROPRIETY OF FEDERAL INTERVENTION

WHERE A STATE TRIBUNAL IS INCOMPETENT TO ADJUDICATE FEDERAL CLAIMS BY VIRTUE OF ITS BIAS.

A. Younger Abstention is Inapplicable to Allegations of Bias.

In Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) this Court determined that the principles underlying Younger abstention are not implicated unless the answers to the following questions are in the affirmative:

> [F]irst, do the state bar disciplinary hearing within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

457 U.S. at 433. Inadequate opportunity to raise constitutional challenges may be established in several ways. First, where there exists procedural obstacles to a fair

opportunity to raise constitutional claims, the opportunity to litigate alleged violations is deemed inadequate. Moore v. Sims, 442 U.S. 415 (1979). Second, where there exists demonstrable practical obstacles to a fair opportunity to raise constitutional claims, the opportunity to litigate alleged violations is similarly deemed inadequate. Younger, 401 U.S. at 45. Finally, where within the decisional tribunal there exists prejudgment on the constitutional claims asserted, or a substantial personal or institutional interest in the outcome, the opportunity to raise those claims is deemed wholly inadequate.[13] Kugler v. Helfant, 421 U.S.

---

[13]Petitioner does not dispute, in general, the judicial nature of bar disciplinary proceedings or the important state interests implicated therein. There can be no legitimate state interest, however, in the investigation and/or adjudication of disciplinary charges,

117 (1975); Gibson, 411 U.S. 564 (1973).

In the face of uncontroverted evidence of misconduct adverse to Mr. Mason's rights, the Second Circuit held Mr. Mason's claims of bias "wholly speculative." As this Court recognized in affirming the district court in Gibson, however,

> the inquiry [i]s not whether the Board members were "actually biased but whether, in the natural course of events, there is an indication of possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him."

411 U.S. at 571.[14]

The undisputed facts on this record establish, inter alia, that (1) the Attorney General of the State of New York

---

whether brought in good or bad faith, before a biased tribunal.

[14]Nor is the question whether, on a motion for preliminary injunction, Mr. Mason could prove actual bias.

publicly released a ten-page complaint against Mr. Mason charging him with professional misconduct in a highly political, racially sensitive case and called upon the state's Disciplinary Committee to impose disciplinary sanctions; (2) the Presiding Justice of the Appellate Division of New York, in reaction to the Attorney General's publication, sought to pressure the presumably independent Chief Counsel of the disciplinary committee to lodge formal charges immediately against Mr. Mason; (3) the Chief Counsel of the Disciplinary Committee was subsequently ousted by the Presiding Justice, in part, because of the Presiding Justice's disapproval of his handling of the underlying disciplinary investigation of Mr. Mason; (4) the former Chief Counsel filed a formal complaint against the

Presiding Justice with the State Commission on Judicial Conduct alleging, inter alia, that the Presiding Justice improperly interfered with the underlying disciplinary investigation of Mr. Mason; (5) the Court of Appeals for the State of New York ordered the Appellate Division to investigate the charges; (6) the independent investigations by the State Commission on Judicial Conduct and the Appellate Division were conducted in secret without providing Mr. Mason or his counsel an opportunity to confront the evidence or examine the witnesses to determine whether his rights had been violated; and (7) the Court of Appeals accepted and endorsed the conclusion of the Appellate Division's self-examination that no unethical conduct had occurred without reviewing the underlying evidence on which the conclusion

was based.

In Gibson, licensed optometrists charged with unprofessional conduct based upon their employment with a business corporation sought and obtained an injunction against proceedings before the Alabama Board of Optometry on the ground that the administrative process was biased. The district court found adequate evidence of bias both in prejudgment and personal interest and, thus, enjoined the proceedings. This Court affirmed the injunction based upon personal interest but declined to reach the prejudgment issue. Specifically, this Court held that the Board of Optometrists was disabled due to a potential pecuniary interest in the outcome of its proceedings for each member of the Board. Here, the Second Circuit adversely decided Mr. Mason's claims of prejudgment,

but failed to address the question of personal and/or institutional interest.

As in Gibson, however, there is "sufficient substance" to the claim that the disciplinary machinery of the First Judicial Department for the State of New York is incompetent by reason of bias to adjudicate Mr. Mason's claims. The controversy that erupted following the discharge of Mr. Gentile, which was prompted by the public filing of the complaint of the Attorney General against Mr. Mason, resulted in serious charges of misconduct specifically with respect to the investigation of Mr. Mason. Published accounts quoted Committee members, Justices, and other court personnel taking sides in the dispute. Moreover, the New York Times reported that "some of the committee's 36 members now believe that the

case against Mr. Mason has been tainted by Justice Murphy's interference." NYT, A Top Justice Fights Charges Of Misconduct, April 21, 1989, p. B1, B2. Further, the controversy proved "embarrassing to ... judges all over the State." NYT, Wachtler to Act on Lawyer's Panel Fight, Feb. 4, 1989, B1.

The facts surrounding the aftermath of the forced resignation of Mr. Gentile are both legion and suspicious. Those facts and circumstances, fairly construed, clearly give rise to an impermissible risk of bias, warranting federal intervention to determine Mr. Mason's claims. Both the Disciplinary Committee and the Appellate Division are infested with an impermissible conflict-of-interest, whether characterized as direct or indirect. Namely, their interest is in restoring integrity and

respect to their proceedings. As in Gibson, the disciplinary machinery of New York State bears to benefit from one determination on Mr. Mason's claims and to suffer from another. A conclusion that Mr. Mason's federal allegations of official misconduct by and within the Appellate Division and its Disciplinary Committee are false is in the interest of each member of those bodies. "[I]n the natural course of events, there is an indication of possible temptation" to those who are to consider the allegations against Mr. Mason "to try the case with bias for or against any issue presented." Gibson, 411 U.S. at 571.

The Appellate Division's interest in disproving Mr. Mason's claims is exacerbated by its internal investigation exonerating, not only the accused Justice Murphy, but also all members of the Court

of any wrongdoing. This latter conflict-of-interest is shared by the Court of Appeals of the State of New York, which upon receipt of the report of the Appellate Division expressed satisfaction and commended the Justice's efforts without reviewing the fruits thereof.

In sum, at each level of the disciplinary machinery of the first department, a determination has been made (based upon evidence to which Mr. Mason has no access in the normal course of the underlying proceedings) on issues identical to or inextricably intertwined with Mr. Mason's federal claims. The involvement by the DDC, its Committee, the Appellate Division and the Court of Appeals in the purported resolution of the Gentile/Murphy controversy, in which Mr. Mason's investigation figured prominently, gives

rise to an impermissible risk of bias, and, further, constitutes unambiguous authority that Mr. Mason cannot adequately, fairly, and/or consistent with the principles espoused in Middlesex, pursue his due process claims with respect to the effect of that controversy before these bodies. The Second Circuit's failure to pass upon the conflict-of-interest claims triggered by the Gentile/Murphy controversy and all of its offspring, effectively denies Mr. Mason the relief to which he is entitled under the decisions of this Court.[15]

B. Petitioner's Prima Facie Showing of Bias Entitled Him to an Evidentiary Hearing and Required Respondents to Come Forward With Evidence That the Proceedings Were Not Tainted By Bias.

Under Younger, a plaintiff seeking

---

[15]MR. Mason does not abandon his claim of bias by virtue of prejudgment. For purposes of this petition he has limited his discussion to the claim which was ignored by the Second Circuit.

federal intervention must meet a heavy burden justifying departure from the fundamental policy against federal interference in legitimate state proceedings. Where a plaintiff's allegations

> depict a situation in which defense of the State's . . . prosecution will not assure adequate vindication of constitutional rights[, and] . . . suggest that a substantial loss of or impairment of freedoms of expression will occur if [plaintiff] must await the state court's disposition and ultimate review in this Court of any adverse determination[, t]hese allegations, if true, clearly show irreparable injury.

Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965), quoted in Younger, 401 U.S. at 48-49. Allegations of bias, supported by demonstrably objective evidence, are sufficient proof of the irreparable harm necessary to obtain preliminary injunctive

relief.[16] Accordingly, the burden imposed upon a plaintiff seeking to invoke the traditionally recognized jurisdiction of the federal courts is less than that imposed upon a plaintiff seeking an exception to the policy of federal deference to state court proceedings underlying the Younger abstention doctrine.

Here, petitioner plead sufficient facts and presented objective evidence of, at a minimum, an impermissible risk of bias within and Appellate Division and the

---

[16]Courts have consistently recognized that submission of ones claims to a biased tribunal is inherently harmful and satisfies the irreparable harm requirement for injunctive relief. See Gibson, 411 U.S. at 577; Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); United Church of the Medical Center v. Medical Center Comm'n, 689 F.2d 693, 699 (7th Cir. 1982); Wichert v. Walter, 606 F.Supp. 1516, 1522 (D.N.J. 1985); see also In Re Murchinson, 349 U.S. 133, 136 (1955) (recognizing a prohibition against trial before judges who may have no "actual bias" to satisfy the appearance of justice'").

Disciplinary Committee. Under the traditional rules governing injunctive relief, that showing was sufficient to warrant the issuance of a preliminary injunction to further consider Mr. Mason's claims. "[U]nder these circumstances the District Court issuing the injunction would have continuing power to lift it at any time and remit the plaintiff[] to the state courts if circumstances warranted." Younger, 401 U.S. at 49.

In the face of Mr. Mason's overwhelming objective evidence of misconduct and bias and in the absence of any contrary evidence from the Disciplinary Committee, the failure and/or refusal of the Second Circuit to shift the burden onto the Committee to rebut the uncontroverted inference of prejudice effectively denied Mr. Mason a hearing on his constitutional

claim. Because the Second Circuit imposed an improper burden on petitioner at the threshold to present credible evidence of impermissible bias and/or failed to credit his undisputed prima facie showing, this Court should grant a writ of certiorari.

II. THE PUBLIC DISSEMINATION BY THE NEW YORK STATE ATTORNEY GENERAL OF CHARGES OF PROFESSIONAL MISCONDUCT AGAINST PETITIONER IN A HIGHLY CONTROVERSIAL AND RACIALLY SENSITIVE CASE WAS UNETHICAL AND DEPRIVED PETITIONER OF HIS RIGHTS TO DUE PROCESS AND A FAIR AND IMPARTIAL TRIBUNAL

The claim that both the district court and the Second Circuit assiduously avoided lies at the heart of Mr. Mason's complaint. Specifically, the effect of the Attorney General's public dissemination of his complaint on the bodies which were to determine the validity of those allegations has never been squarely addressed. Notwithstanding the independent impropriety of the dissemination of the Attorney General's complaint,[17] the events that

---

[17]DR8-101(2) prohibits a lawyer who holds a public office from "[u]s[ing] his public position to influence, or attempt to influence, a tribunal to act in favor of himself ...." There can be little doubt that the Attorney General's actions were intended to and/or had the effect of directly influencing the actions of at

unfolded thereafter, as repeatedly and widely reported in the media, confirmed the undue influence of the state's top prosecutor on the disciplinary machinery of the First Department, if not the entire state.

The Second Circuit's implication that the Disciplinary Committee need not consider Mr. Mason's due process challenges to the Attorney General's conduct necessarily authorizes state court avoidance of Mr. Mason's claims of bias, and relegates him, in the first instance, to a tribunal, which by all objective indicia, is biased against him. The court's failure to probe the relationship between the Attorney General and the Office

---

least both Justice Murphy and MR. Gentile, the respective heads of the judicial and administrative arms of the disciplinary machinery for the First Department.

of Chief Counsel during the pendency of the grand jury investigation constitutes a total abrogation of the responsibility of federal courts to insure that a legitimate state interest is at stake. There can be no cognizable, legitimate state interest in subjecting attorneys to bar disciplinary investigations and/or proceedings before biased tribunals.

Both the Second Circuit and district court also ignored the implications of the DDC's resolution of Mr. Mason's complaint challenging the conduct of the Attorney General. While rejecting as baseless Mr. Mason's claims that the Attorney General's publication of his allegations of misconduct against him operated to undermine his rights to due process and an impartial tribunal, the DDC simultaneously advised Mr. Mason the matter concerning his

complaint against the Attorney General remains confidential. The obvious application by the DDC of a double standard to the question of the propriety of disseminating complaints of misconduct against attorneys is itself evidence of Committee bias against Mr. Mason, and further infringes upon his right adequately to defend himself against public allegations of misconduct.

Indeed, in Butterworth v. Smith, 58 U.S.L.W. 4363, 4365 (U.S. March 21, 1990), (No. 88-1993, this Court recently recognized, in a different yet similar context, that the interest in keeping information regarding a "targeted individual" dissipates once the individual has presumably been exonerated. Although petitioner recognizes, in general, the state's interest in preserving the

confidentiality of complaints deemed to be baseless, it shocks the conscience that the DDC could elevate the "reputational interests" of the Attorney General over the due process and First Amendment rights of Mr. Mason.[18]

The Second Circuit ignored material facts warranting further inquiry into the circumstances surrounding the investigation by the DDC of the Attorney General's complaint. The DDC has repeatedly indicated its refusal to consider charges concerning the conduct of the Attorney General as part of its inquiry into the

---

[18]The incident complained of in Mr. Mason's complaint against the Attorney General was a public act of a public official. The DDC's confidentiality requirement therefore, impairs not only Mr. Mason's right to defend himself but it also encumbers his right, at the cornerstone of First Amendment freedoms, to criticize government officials.

allegations against Mr. Mason.[19] The Second Circuit has erroneously endorsed that view. If Mr. Mason's allegations are true, as they must be assumed to be, federal dismissal under Younger permits the very state proceedings the Constitution forbids. Accordingly, this Court should issue a writ of certiorari.

---

[19]Moreover, notwithstanding the clear conferral by 22 N.Y.C.R.R. § 603.5 upon "an attorney under. . . investigation" of the right to subpoena witnesses, the DDC has orally maintained that said right does not attach unless and until formal charges are filed, and has further indicated that it will oppose the issuance of any such subpoenas.

III. YOUNGER ABSTENTION IS UNWARRANTED ON THIS RECORD

Mr. Mason's claims meet the bad faith, harassment, and/or extraordinary circumstances exception to Younger abstention. Under extant law, "[a] showing of bad faith or harassment is equivalent to a showing of irreparable injury under Younger, and irreparable injury independent of the bad faith prosecution need not be established." Fitzgerald v. Peek, 636 F.2d 943, 944 (5th Cir. 1981) (per curiam) (citing Shaw v. Garrison, 467 F.2d 113, 120, (5th Cir.), cert. denied, 409 U.S. 1024 (1972).

Although this Court has noted that bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction," Kugler, 421 U.S. at 126 n.6, courts have recognized that "[b]ad faith

can take many forms," Wilson v. Thompson, 593 F.2d 1375, 1382 n.7 (5th Cir. 1979), and may be, in some instances, demonstrated absent a showing that a prosecution could not possibly result in a valid conviction. For example, where the initiation of the action was itself pursuant to impermissible reasons, court have recognized an exception to Younger. Wilson, 593 F.2d at 1383. Accord Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); Martin v. Attaway, 506 F.Supp. 603 (S.D.Ga. 1981). Similarly, bad faith exist where the expectation of obtaining a facially "valid conviction" is based upon committing the charges to a patently biased tribunal.

Younger also recognizes that "[t]here may . . . be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of bad faith

and harassment." 401 U.S. at 53. Like the "bad faith" exception, the "extraordinary circumstances" exception is a flexible one which evades precise definition.[20] The official misconduct alleged by Mr. Mason's complaint cannot be shielded from federal review on the basis that it is so extraordinary that it was not expressly anticipated by this Court.

The decision of the Second Circuit that Mr. Mason may raise whatever legitimate defenses he has throughout the state judicial process begs the question whether the underlying investigation is being conducted in bad faith. The right recognized by this Court and the lower courts "is to be free of bad faith charges

---

[20] See Younger, 401 U.S. at 54 (recognizing and declining to specify broad range of unusual situations warranting federal intervention).

and proceedings, not to endure them until their speciousness is eventually recognized." Bishop v. State Bar of Texas, 736 F.2d 292, 294 (1984) (citing Shaw v. Garrison, 467 F.2d 113, 122 n.11 (5th Cir.), cert. denied, 409 U.S. 1024 (1972).[21]

The Second Circuit failure to recognize the breadth of the "bad faith" exception to Younger abstention was

---

[21]Although the Second Circuit does not specifically reject Mr. Mason's claim that the allegations of the Attorney General are brought in bad faith and for the purpose of harassment, it suggests that the propriety of the Committee's inquiry into the allegations may be properly pursued through the state court process. See A-15 to 16. Parenthetically, the bulk of the charges by the Attorney General against Mr. Mason involve plain expressions of opinion, protected by the First Amendment, or pure speculation, the response to which implicates the attorney-client privilege. Mr. Mason maintains that the assertion of those allegations are in bad faith and the requirement by the Committee that Mr. Mason defend against such allegations constitutes harassment.

compounded by its application of an erroneous legal standard to determine whether Mr. Mason's burden of demonstrating the same had been met. In Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982) the Fifth Circuit Court of Appeals reaffirmed its standard for applying the "bad faith" exception to Younger in a given case. Drawing from its prior decision in Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979), the Hightower Court employed a burden shifting mechanism "to determine if the constitutional violation is causally related to the prosecution that the plaintiff seeks to enjoin" Hightower, 693 F.2d at 367. Under this mechanism, the plaintiff must first demonstrate "that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected." Id. at 366 (citations

omitted). Second, the plaintiff must show that the state's bringing of the challenged proceeding "was motivated at least in part by a purpose to retaliate for or to delete that conduct." Id. Thereafter, the burden shifts to the state to demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . whether to prosecute even had the impermissible purpose not been considered." Id.

There can be no question that the underlying investigation of Tawana Brawley's allegations was controversial. Mr. Mason concedes that he criticized the Attorney General's performance throughout the investigation and submitted published accounts memorializing such criticisms. Indeed, Mr. Mason specifically alleged that Mr. Abrams' conduct was singularly intended

to repudiate challenges made throughout the course of the investigation to his prosecutorial competency[22] -- challenges that, no matter how offensively perceived, are at the heart of First Amendment freedoms. See Bridges v. California, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

Further, Mr. Mason produced evidence indicating that the Office of the Chief Counsel and the DDC were merely acting as

---

22 A finding of "bad faith" is warranted where a prosecutor pursues highly questionable charges apparently for the sole purpose of gaining publicity for himself. Shaw v. Garrison, 467 F.2d 113 (5th Cir.), cert. denied, 409 U.S. 1024 (1972). Moreover, "the strength of the evidence and the seriousness of the charges should be considered in determining if retaliation or bad faith exists." Hightower, 693 F.2d 359 (1982). See infra note 21.

the catspaw of the Attorney General, or otherwise shared a common, illicit purpose. Specifically, the letter of Mr. Gentile during the pendency of the underlying grand jury investigation to the Attorney General may be reasonable construed as a solicitation of a complaint from the Attorney General. Moreover, and more important, the DDC's disposition of Mr. Mason's claim of misconduct against the Attorney General further indicates a concerted effort to retaliate again him. Finally, the absence of any evidence that the Committee had indeed initiated and was actively conducting a "sua sponte" investigation prior to the receipt of the Attorney General's complaint indicates improper motive.[23]

---

[23]Again, the content of the complaint and circumstances of its dissemination further support Mr. Mason's claim of

Mr. Mason's proof was adequate to obtain a preliminary injunction. In this regard, Lewellen v. Raff, 851 F.2d 1108 (8th Cir. 1988), makes clear that the quantum or proof required to be produced by plaintiff varies depending upon the stage of the proceeding and the nature of the relief requested. Specifically, the showing required to obtain a preliminary injunction on a claim of bias is clearly less than the substantially heavier showing necessary to secure a permanent injunction. Lewellen, 851 F.2d 1108, 1110 (8th Cir. 1988).

Mr. Mason's complaint alleged facts sufficient to bring his claims within one of the recognized exceptions to Younger

---

retaliatory purpose. During the press conference in which the complaint was released, the Attorney General publicly vilified both Messrs. Mason and Maddox, and chastised the Brawley family.

abstention, and his motion for preliminary injunction should have been granted. This Court should issue a writ of certiorari to insure that the standards governing federal interference with state proceedings are not manipulated to deprive advocates of controversial causes their constitutional guarantees of due process and free speech. Mr. Mason's challenges are precisely contemplated by the long-honored exceptions to Younger abstention.

CONCLUSION

For all of the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephanie Y. Moore
666 Broadway, 7th Floor
New York, N.Y. 10012
(212) 614-6464

William M. Kunstler*
Ronald L. Kuby
13 Gay Street
New York, N.Y. 10014
(212) 924-5661

*Counsel of Record
for Petitioner

Dated: May 10, 1990

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 545 -- August Term 1989

Argued: Oct. 4, 1989
Decided: January 16, 1990

Docket No. 89-7918

C. VERNON MASON,

Plaintiff-Appellant,

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT: OFFICE OF CHIEF COUNSEL,

Defendants-Appellees.

Before: NEWMAN, PRATT, and MAHONEY, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (John E. Sprizzo, Judge) dismissing on abstention grounds a complaint that sought an injunction against an investigation by a

state court disciplinary committee.

Affirmed.

Stephanie Y. Moore
New York, N.Y.
(William M. Kunstler
Ronald L. Kuby
New York, N.Y. on
the brief), for
plaintiff-appellant.

James G. Greilsheimer
New York, N.Y.
(Alan M. Klinger
Joseph J. Giamboi
Stroock & Stroock & Lavan
New York, N.Y. on
the brief), for
defendants-appellees.

JON O. NEWMAN, Circuit Judge:

C. Vernon Mason, a lawyer, appeals from the August 24, 1989, judgment of the District Court for the Southern District of New York (John E. Sprizzo, Judge) dismissing his complaint, which sought to enjoin an investigation of him by a state court disciplinary committee looking into possible violations of the Code of Professional Responsibility. The District Court concluded that the complaint failed to allege circumstances sufficient to warrant an exception to the abstention doctrine as enunciated in Younger v. Harris, 401 U.S. 37 (1971), and, more particularly in the context of lawyer disciplinary matters, in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982). We affirm.

Background

In June 1988, the Departmental Disciplinary Committee of the New York Supreme Court, First Judicial Department ("the Committee"), which is the appellee here, began an investigation of Mason on its own initiative, acting pursuant to N.Y Rules of Court § 605.6(a) (McKinney 1989). The Committee acted in response to numerous inquiries and allegations it had received concerning Mason's conduct in connection with his representation of Tawana Brawley. Brawley had become the center of a controversy arising out of her claim that a group of men had abducted and raped her. In the course of controversy, the Governor of New York appointed the Attorney General, Robert Abrams, as a special prosecutor to investigate Brawley's claim. Abrams

convened a special grand jury, which sought unsuccessfully to obtain testimony from Brawley and her mother. Ultimately the Grand Jury issued a report concluding that Brawley's claim was without basis in fact.

During the course of the Grand Jury's inquiry, the Committee had notified Abrams that it had begun an investigation of Mason and had requested that relevant materials be produced after the Grand Jury completed its work. When that occurred, Abrams announced that he would request the appropriate disciplinary committees to consider disciplinary proceedings against Brawley's advisers, including Mason. In an October 6, 1988, letter to the Committee, Abrams detailed the respects in which he believed Mason had violated the Code of Professional Responsibility. In an October 14, 1988, letter to Mason, the Committee

informed him of its investigation, enclosed a copy of Abrams' October 6 letter, and asked him to respond by November 4 to the allegations of professional misconduct in Abrams' letter.

Lawyers purporting to represent Mason twice asked the Committee for an extension of time to reply; both requests were denied. One of these lawyers submitted a response to the Committee on November 4. Thereafter new counsel for Mason wrote the Committee to ask for a return of the November 4 response; this request was denied. In subsequent correspondence, the Committee informed Mason that one of his lawyers, Stephanie Y. Moore, Esq., could not represent him as she was not admitted to practice in New York.

Mason then began a series of actions in state court. On December 5, 1988, he

moved in the Supreme Court for disclosure of the Grand Jury minutes; this motion was denied. On December 8, the Committee again told Mason that he could not withdraw his response, but gave him until January 9, 1989, to file a supplemental response. On December 20, 1988, Mason began an Article 78 proceeding in the Appellate Division, seeking an order requiring the Committee to grant him a further extension and to recognize Moore as his lawyer. On January 5, 1989, Mason began a second Article 78 proceeding, seeking an order directing the Committee to cease its investigation and to disclose communications concerning the investigation between Abrams and the Committee's then chief counsel, Michael A. Gentile. On February 22, the Appellate Division ruled in both proceedings. The Court granted Mason 60 additional days to

respond to the Committee, allowed Moore to appear for Mason upon filing a proper application for pro hac vice admission, and dismissed the second Article 78 proceeding. Leave to appeal to the Court of Appeals was denied.

Prior to the extended date for filing his response with the Committee, Mason filed the instant lawsuit in the District Court. The parties stipulated to defer Mason's response until disposition by the District Court. The federal court complaint asserted, among other things, that the action of the Attorney General in disclosing his allegations of unethical conduct by Mason and the Committee's "solicitation" and "adoption" of the Attorney General's "complaint" deprived Mason of his rights to due process of law and impaired his First Amendment right to

freedom of speech.

Since Mason's claim for federal court intervention relies on developments concerning the resignation of the Committee's chief counsel, those developments must be elaborated. On January 13, 1989, Gentile resigned at the request of the Honorable Francis T. Murphy, Presiding Justice of the Appellate Division, First Department. On that date Justice Murphy released a report explaining why he had requested the resignation. The report mentioned deficiencies in Gentile's administration of various matters in his office, including the Mason investigation. On February 16, the Honorable Sol Wachtler, Chief Judge of the New York Court of Appeals, directed the First Department to make an inquiry concerning the Gentile resignation and "promptly do whatever is

necessary to maintain the dignity, respect and integrity" of the Court and the Committee. N.Y. Law Journal, Feb. 16, 1989, at 1, col. 3. Justice Murphy appointed four justices of the Appellate Division, First Department, to conduct the inquiry. All twelve of the associate justices of the First Department participated in the questioning of witnesses during the inquiry. On April 18, the Appellate Division released a report, concurred in by all but one of its members. Among other things, the report concluded that no member of the Court had participated in the investigation of any disciplinary matter. Chief Judge Wachtler, on behalf of the Court of Appeals, issued a letter to the Appellate Division, expressing satisfaction that the objectives of the inquiry process had been met.

The District Court denied Mason's motion for a preliminary injunction and dismissed the complaint on abstention grounds. The Court heard oral argument but denied a request for an evidentiary hearing. A panel of this Court granted an expedited appeal and stayed the Committee's efforts to obtain further information from Mason. After receiving the parties' briefs and hearing oral argument, this panel vacated the stay.

Discussion

Appellant acknowledges the pertinence of Younger abstention to attorney disciplinary proceedings, see Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. at 432-35, but contends that his complaint sufficiently alleges "bad faith, harassment, or some other extraordinary circumstance that would make

abstention inappropriate," id.. at 435. He contends that he lacks an effective opportunity to assert his constitutional claims because the Committee is biased and is "jurisdictionally incompetent" to adjudicate his allegations of official misconduct. He also contends that he has no opportunity for effective judicial review within the state court system.

Mason's allegations of bias do not set forth circumstances that warrant federal court intervention. See Kugler v. Helfant, 421 U.S. 117 (1975). Contrary to his assertions, the Committee is not disabled from proceeding because it sought evidence of his possibly unethical conduct from the Attorney General nor because the Attorney General aired his allegations against Mason. Moreover, Mason mischaracterizes the situation in contending, as evidence of

bias, that the Committee has "adopted" the Attorney General's "complaint." Thus far, the Committee has not filed any charges against Mason. See N.Y. Rules of Court § 605.12. It is conducting an inquiry to determine whether to file charges. In doing so, the Committee is entitled to seek evidence that the Attorney General may have. The Committee does not disable itself from proceeding by requesting a response from Mason as to the matters raised by the Attorney General nor by alerting Mason to the general scope of the requested response through the device of sending him the allegations made by the Attorney General.

Nor is bias shown by the allegations concerning the resignation of Gentile, the role of Justice Murphy in such resignation, or any state inquiry into such matters. It

is wholly speculative for Mason to conclude that the members of the Committee or its current staff have prejudged him, or are incapable of impartially deciding whether to initiate formal proceedings and, in that event, of conducting them fairly. Finally, no sufficient claim of bias is shown by the fact that the Committee has rejected Mason's claim of bias, nor by the state courts' refusal to halt the Committee's efforts to ascertain whether grounds exist for formal charges. Obviously state forums do not disable themselves from investigating and adjudicating matters simply by disagreeing with accusations made against them.

Mason's further point that the Committee is unable to adjudicate many of his allegations is partly irrelevant and partly mistaken. To the extent that he

faults the Committee because it will not adjudicate his allegations of misconduct by other persons, his point is irrelevant to the propriety of the Committee's inquiry into the allegations against Mason. The Committee is not disabled from proceeding because it declines to make the Mason inquiry an occasion for assessing the lawfulness of others. To the extent that Mason has legitimate defenses to any charges that may be brought against him, he will have an opportunity to assert his defenses in appropriate New York forums. See Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 519 (2d Cir.), cert. denied, 434 U.S. 834 (19177); Anonymous v. Association of the Bar, 515 F.2d 427, 432 (2d Cir.), cert. denied, 423 U.S. 863 (1975); Erdmann v. Stevens, 458 F.2d 1205, 1211-12 (2d Cir.), cert. denied, 409 U.S. 889 (1972);

Matter of Capoccia, 59 N.Y.2d 549, 553, 466 N.Y.S.2d 268, 269 (1983); Matter of Anonymous Attorneys, 41 N.Y.2d 506, 509, 393 N.Y.S.2d 961, 964 (1977).

Mason's assertion of the futility of judicial review through the state court system has two components. His first point echoes his claim of bias by asserting that state court review is futile because he has thus far not prevailed in his effort to halt the Committee's inquiry. In fact, his recourse to the state courts has demonstrated that those courts are fully prepared to rule favorable on his meritorious assertions. Their refusal to halt the inquiry at its incipient stage provides no basis for believing that they will be reluctant to entertain any legitimate objections Mason may have inn the event that disciplinary sanctions are

improperly imposed.

Mason's second point is that state law does not permit judicial review of one possible step the Committee might take -- the issuance of a letter of caution. See N.Y. Rules of Court §§ 605.6(e)(3), 605.7, 605.8. He relies on Parker v. Commonwealth of Kentucky Board of Dentistry, 818 F.2d 504 (6th Cir. 1987), for the proposition that Younger abstention is not warranted where the opportunity for judicial review "is contingent upon the type of disciplinary action taken." Id. at 509. Parker concerned an absence of judicial review of all the available disciplinary sanctions except the sanction of license revocation. By contrast, under New York's procedures, all actions characterized as disciplinary are subject to judicial review. A letter of caution "does no

constitute discipline by the Committee." N.Y. Rules of Court § 605.8(b)(2)(ii). Of course, a state may not employ labeling to insulate from judicial scrutiny adverse action that impairs constitutionally protected rights. If it should develop that a letter of caution is issued under circumstances where such action impairs Mason's federal rights, we are not foreclosing federal court scrutiny. But the possibility of such an eventuality is too speculative to warrant a relaxation of Younger abstention requirements.

In sum, Mason has alleged no circumstances that show that the Committee or the state courts are proceeding against him in bad faith or harassing him, nor has he alleged any other valid grounds for an exception to Younger abstention. The District Court was entirely correct in its

conclusion that Mason's complaint did not require an evidentiary hearing and that the complaint should be dismissed.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of January, one thousand nine hundred and ninety.

PRESENT: Hon. Jon O. Newman,
Hon. George C. Pratt,
Hon. J. Daniel Mahoney

CIRCUIT JUDGES

C. VERNON MASON,

Plaintiff-Appellant Docket

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT: OFFICE OF CHIEF COUNSEL,

Defendants-Appellees

Appeal from the
United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States

District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

C. VERNON MASON,

Plaintiff,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, Office of the Chief Counsel,

Defendant.
----------x

89 Civ. 3598 (JES)

MEMORANDUM OPINION AND ORDER

SPRIZZO, D.J.:

Plaintiff C. Vernon Mason brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiff seeks to preliminarily and permanently enjoin defendant Departmental Disciplinary Committee ("DDC") from proceeding with an

investigation into plaintiff's allegedly improper conduct as an attorney. Defendant has cross-moved to dismiss the complaint pursuant to Younger v. Harris, 401 U.S. 37 (1971). For the reasons that follow, defendant's motion is granted and plaintiff's motion is denied.

FACTS

The following facts are undisputed.

Plaintiff C. Vernon Mason is an attorney admitted to practice and practicing law in the First Judicial Department of New York State. Defendant DDC is the entity charged with the responsibility of investigating allegations of attorney misconduct in the First Judicial Department. See N.Y. Comp. Code Rules & Reg. tit. 22 § 603.4.

After receiving a letter from five New

York Assemblymen in June of 1988, see Complaint, Exhibit A at 236; Affidavit of Hal R. Lieberman ("Lieberman Aff.") at ¶ 5, the DDC, through its then Chief Counsel Michael Gentile, wrote a letter to the Attorney General of the State of New York, Robert Abrams, requesting his assistance in the investigation of possibly improper conduct by plaintiff in connection with his representation of Tawana Brawley. See id. at ¶6; N.Y. Comp. Code Rules & REg. tit. 22 § 603.4(c). In addition, the DDC indicated it would stay its investigation pending completion of a grand jury investigation into the Brawley case. See Lieberman Aff. at ¶ 8.

On October 6, 1988, the Attorney General publicly released the grand jury's report and a complaint detailing allegations of plaintiff's potentially

unethical conduct. See id. at ¶ 9. Thereafter, on October 14, 1988, the DDC mailed a copy of the Attorney General's complaint to plaintiff and requested a response to the allegations contained therein within twenty days. See id.

After plaintiff's requests for an extension of time to respond to the complaint were denied, plaintiff answered the charges on November 4, 1988, and was advised by the DDC that he could supplement his answer by January 9, 1989. See id. at ¶ 12 n.1. In addition, the DDC notified plaintiff that Stephanie Moore would not be permitted to represent him in the disciplinary proceeding because she is not admitted to practice in New York.[1]

---

[1]Defendant's actions later became the subject of two ARticle 78 petitions. One petition challenged the denial of plaintiff's requests for an extension and the DDC's decision not to allow Ms. Moore

In January and February of 1989, a controversy regarding the handling of DDC investigations arose involving the DDC's then Chief Counsel Michael Gentile and the Chief Judge of the Appellate Division, First Department, Justice Francis Murphy. See Complaint at ¶ 26. Plaintiff contends that this controversy is related in some fashion to his pending disciplinary investigation. See id. at ¶¶ 29-30. Mr. Gentile later resigned from his position with the DDC and, after conducting an

---

to represent him. See Complaint at ¶ 19. The second petition sought to have the complaint dismissed on grounds similar to those alleged in the instant action. See id. at 23. By order dated February 22, 1989, the Appellate Division, First Department, granted plaintiff a sixty day extension of time to respond, affirmed on the issue of Ms. Moore's representation and denied the motion to dismiss the disciplinary complaint without opinion. See id. at ¶¶ 39-41. Leave to appeal was denied by the New York Court of Appeals on May 5, 1989. See id. at ¶ 49.

investigation, the Justices of the First Department found that Justice Murphy had not engaged in any ~~improper~~ conduct. See id. at ¶ 47.

DISCUSSION

Plaintiff now contends that the institution of disciplinary proceedings against him violates his First Amendment rights, and that the manner in which the disciplinary investigation was initiated and is being conducted violates his due process rights under the Fourteenth Amendment. Defendant argues that this Court should abstain from taking jurisdiction over this action and dismiss plaintiff's complaint under Younger v. Harris, 401 U.S. 37 (1971).

Younger v. Harris, requires that, consistent with principles of federalism

and comity, federal courts refrain from interfering with ongoing state criminal proceedings. The Younger doctrine has since been extended to encompass other non-criminal proceedings, see e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and in particular has been held applicable to attorney disciplinary proceedings, see Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982); Anonymous v. Assoc. of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975); Erdman v. Stevens, 458 F.2d 1205 (2d Cir. 1972), so long as those proceedings afford an adequate opportunity to raise constitutional challenges. See Middlesex, supra, 457 U.S. at 432.

Plaintiff does not claim and cannot claim that under New York law he cannot obtain effective judicial review of his

constitutional challenges to the disciplinary proceedings.[2] See Erdman, supra, 458 F.2d at 1211. Plaintiff does contend, however, that defendant's bad faith and other extraordinary circumstances make abstention inappropriate. However, while it is true that a showing of bad faith or extraordinary circumstances could justify federal judicial relief not withstanding the pendency of state judicial proceedings, see Middlesex, supra, 457 U.S. at 435, plaintiff has failed to demonstrate that such extraordinary circumstances or

---

[2]Plaintiff does argue that if he receives a letter of caution from the DDC, he will not be permitted to raise his constitutional claims. However, a letter of caution is the lightest sanction which the DDC may impose, and carries with it virtually no adverse consequences. See N.Y. Comp. Code Rules & Reg. tit. 22 § 603.9(b). That circumstance, along with the merely speculative possibility that such a sanction will be imposed, is not enough to preclude Younger abstention.

bad faith are present here.

Plaintiff first argues that because the DDC sought the Attorney General's assistance inn pursuing its investigation, and because the Attorney General publicly disseminated his complaint, the DDC has acted impartially and in bad faith. Even assuming, however, that these allegations evidence some impropriety, they are not sufficient to show the bad faith required by Younger. Younger's bad faith exception requires that the proceedings have no basis in fact or be brought solely for purposes of harassment. See Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975).

Plaintiff also argues that the controversy between Justice Murphy and Mr. Gentile somehow involved the DDC's investigation of his conduct, and that this controversy, coupled with the Appellate

Division's subsequent investigation of the controversy, has rendered the DDC and the Appellate Division irretrievable biased against him. This bare allegation falls short of the showing of bias necessary to make Younger abstention inappropriate.[3] See Collins v. County of Kendall, 807 F.2d 95, 99 (7th Cir. 1986). Moreover, any such bias can be the basis of a motion to recuse any member of the DDC or the Appellate Division, and New York law requires recusal for actual or apparent bias. See N.Y. Jud. Law § 14 (McKinney 1983); Code of Judicial Conduct, Canons 2 & 3, reprinted in, N.Y. Jud. Law App. (McKinney 1975). In

---

[3]Plaintiff's reliance upon Gibson v. Berryhill, 411 U.S. 564 (1973) is misplaced. In Berryhill, the Court's finding that a biased tribunal prevented plaintiff from raising constitutional claims was based upon a clear showing that the tribunal had a pecuniary interest in the outcome of the proceedings. See id. at 578-79. No such showing has been made here.

addition, plaintiff may also move to transfer the venue of the proceedings to another Department of the Appellate Division.

Finally, plaintiff argues that the DDC's refusal to grant an extension of time to respond to the charges, and its refusal to accept Ms. Moore as his representative, evidence impartiality and bad faith. These arguments are unpersuasive. A mere disagreement between plaintiff and the DDC with respect to the exercise of the DDC's discretion, without more, is totally insufficient predicate for a claim of bias sufficient to make Younger abstention inappropriate.

CONCLUSION

In sum, plaintiff has failed to show that he cannot fairly raise his constitutional claims in the State proceedings, and has failed to show the bad faith or extraordinary circumstances necessary to make younger abstention inappropriate.[4] Thus, this Court is constrained to defer to the state disciplinary proceedings and dismiss plaintiff's complaint. Defendant's motion to dismiss is granted an plaintiff's motion for a preliminary injunction is denied. The clerk is directed to dismiss the complaint and close the above-captioned

---

[4]Merely alleging a fairly unusual set of factual circumstances is not the showing required by Younger. Instead Younger requires a showing of circumstances that are extraordinary "in the sense of creating an extraordinarily pressing need for immediate federal equitable relief." Kugler, supra, 421 U.S. at 125.

action.

It is SO ORDERED.

Dated: New York, New York

August 21, 1989

John E. Sprizzo
United States
District Judge

APPEARANCES

STEPHANIE Y. MOORE, ESQ.
Attorney for Plaintiff
c/o 666 Broadway, 7th Fl.
New York, New York 10012

WILLIAM M. KUNSTLER, ESQ.
Attorney for Plaintiff
13 Gay Street
New York, New York 10014

RONALD L. KUBY, ESQ.
Of Counsel

STROOCK & STROOCK & LAVAN
Attorneys for Defendants
7 Hanover Square
New York, New York 10004

JAMES G. GREILSHEIMER, ESQ.
ALAN M. KLINGER, ESQ.
JOSEPH J. GIAMBOI, ESQ.
Of Counsel

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

Judiciary Law § 90(10) provides:

> Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or

proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

22 N.Y.C.R.R. § 603.4 provides:

(a) (1) This Court shall appoint a Departmental Disciplinary Committee for the Judicial Department, which shall be charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys to whom this Part shall apply, and to impose discipline to the extent permitted by section 603.9 of this Part. This court shall, in consultation with the Departmental Disciplinary Committee, appoint a chief counsel to such committee and such assistant counsel, special counsel and supporting staff as it deems necessary.

(2) The membership of the Departmental Disciplinary Committee shall be a total of not more than 36 persons each of whom shall be appointed by this court for a term of three years, except members who have been appointed to complete unexpired terms, in which case such members may be reappointed for three-year or shorter terms. Two-thirds of the members of the Departmental

Disciplinary Committee shall be members of the Bar of the State of New York in good standing, each of whom shall reside or have an office in the City of New York, and one-third of such members shall be persons who are not members of the Bar, each of whom shall reside or have a principal place of business in the City of New York.

(3)(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court, or by the Departmental Disciplinary Committee or such investigation may be commenced sua sponte by this court or by the Departmental Disciplinary Committee. Complaints must be in writing and subscribed by the complainant but need not be verified.

(d) When the Departmental Disciplinary Committee, after investigation, determines that it is appropriate to file a petition against an attorney in this court, the committee shall institute disciplinary proceedings in this court and the court may discipline an attorney on the basis of the record of hearings before such committee, or may appoint a referee, justice or judge to hold hearings.

(e)(1) An attorney who is the subject of an investigation, or of charges by the Departmental Disciplinary Committee of professional misconduct... may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

> (i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or
>
> (ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
>
> (iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be

made upon the application of the Departmental Disciplinary Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law. The court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of the court.

(f) Disciplinary proceedings shall be granted a preference by this court.

22 N.Y.C.R.R. § 603.5 provides:

(a) Upon application by the Departmental Disciplinary Committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of an attorney, or has commenced proceedings against an attorney, or upon application by an attorney under such investigation, or who is a party to such proceedings, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of any person and the production of books and papers before such

committee or such counsel or any subcommittee or hearing panel thereof designated in such application at a time and place therein specified.

22 N.Y.C.R.R. § 603.9 provides:

(a) The Departmental Disciplinary Committee may issue an admonition or reprimand in those cases in which professional misconduct, not warranting proceedings before this court, is found. An admonition is discipline imposed without a hearing. A reprimand is discipline imposed after a hearing.

(b) The Departmental Disciplinary Committee may issue a letter of caution to an attorney when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment. A letter of caution is not discipline and may not be considered in determining whether to impose discipline or the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney subsequently.

SUPREME COURT, APPELLATE DIVISION
First Judicial Department

Departmental Disciplinary Committee

41 Madison Avenue
New York, N.Y. 10010
(212) 685-1000

June 28, 1988

PERSONAL & CONFIDENTIAL

Honorable Robert Abrams
Attorney General
Department of Law
Two World Trade Center
New York, New York 10047

Re: Sua Sponte Investigation
Docket No. 1233/88

Dear Attorney General Abrams:

The Disciplinary Committee has commenced an investigation into the conduct of C. Vernon Mason, Esq. in connection with the Tawana Brawley matter. I understand that your office may have information, statements and documents which would be relevant and important to our inquiry. I would greatly appreciate it if we could receive any evidentiary materials presently available and if your office would, at the conclusion of the grand jury investigation,

assist us in obtaining the release of all other relevant materials.

This office will not take any steps at this time with regard to Mr. Mason and we will await the outcome of the grand jury's inquiry before proceeding further. However, your immediate assistance and cooperation in this matter would be most helpful in our preparation for possible future action.

Best regards.

Very truly yours,

Michael A. Gentile

MAG:mh

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

C. VERNON MASON,

Plaintiff,

: Civ.

- against -

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; Office of Chief Counsel,

Defendants.

----------x

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, to protect the rights of Plaintiff secured by the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983. This Court has jurisdiction of this cause under and by virtue of 28 U.S.C. §§ 1331,

1343 (3) and (4), because the claims set forth herein arise under and/or are secured by the Constitution of the United States or an Act of Congress.

VENUE

2. The causes of action and claims raised herein arise within the Southern District for the District of New York and the Departmental Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department and its Office of Chief Counsel are party defendants. Accordingly, venue properly resides in this court under and by virtue of 28 U.S.C. § 1391(b).

NATURE OF PROCEEDINGS

3. This is a proceeding for a judgment declaring the rights of Plaintiff, C. Vernon Mason, Esq., an attorney duly licensed to practice law before the courts

of State of New York, pursuant to the First, and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. §1983. Specifically, this action seeks a judgment declaring the pending investigation of plaintiff by defendants in contravention of plaintiff's rights to free speech and due process as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, respectively.

4. This is a proceeding for injunctive relief, preliminarily and permanently enjoining the defendants, Departmental Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department and its Office of Chief Counsel, from proceeding upon complaint number 1233/88 against plaintiff, C. Vernon Mason,

Esq., as said complaint was brought and/or has been pursued in bad faith, for purposes of harassment, and in derogation of plaintiff's rights to due process.

PARTIES

5. Plaintiff, C. Vernon Mason, Esq., is a prominent Black civil rights and criminal defense attorney who has been outspoken cn the issues of racism and racial violence in New York City. He received his doctor of jurisprudence from Columbia Law School in 1972 and was admitted to the practice of law in the courts of the State of New York in 1973. Plaintiff Mason resides and maintains an office in New York County.

6. Defendant Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department [hereinafter "DDC,"

"Disciplinary Committee," or "the Committee"] is an arm of the Appellate Division of the Supreme Court for the First Judicial Department [hereinafter "The Appellate Division"]. The Appellate Division has exclusive jurisdiction, pursuant to New York Judiciary Law 390, over attorney discipline within its department. Defendant Disciplinary Committee is charged, pursuant to § 603.4 of the Rules of Court for the Supreme Court, Appellate Division, with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys to whom the rules apply, and to impose discipline to the extent authorized by § 603.9 of the Rules. Pursuant to § 6.1 of the Rules and Procedures of the Departmental Disciplinary Committee, Appellate Division of the Supreme Court of

the State of New York, First Judicial Department, all matters relating to complaints submitted to the Committee, and any action taken by specified subdivisions thereof, shall be confidential, except upon and to the extent required by the terms of a written waiver of confidentiality by the accused attorney.

7. Defendant Office of Chief Counsel to the Disciplinary Committee was formerly held by Michael A. Gentile. Based on an exclusive news account dated January 4, 1989, Mr. Gentile resigned his post as Chief Counsel to the Disciplinary Committee effective February 1, 1989. Said office is currently held by newly appointed Chief Counsel Hal Lieberman. Defendant Office of Chief Counsel, is maintained at 41 Madison Avenue, New York, New York.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

8. On Saturday, November 28, 1987, Tawana Brawley was discovered outside the Pavilion Apartments in Wappingers Falls lying inside a garbage bag in a fetal position. The fifteen year child, who had been reportedly missing since November 23, was apparently in a semi-conscious state. Her body was smeared with excrement and her hair was short and matted. The words "KKK" and "NIGGER" were written on Ms. Brawley's chest, torso and clothing. Ms. Brawley, who is Black, alleged that she had been abducted and sexually assaulted by several white men, one of whom displayed a policeman's badge.

9. Sometime thereafter, Plaintiff, C. Vernon Mason, Esq., and Alton H. Maddox, Esq., an attorney practicing in the Second Judicial Department of the State of New York, entered the case as legal advisers to

Tawana Brawley.

10. On or about January 26, 1988, pursuant to repeated requests by Plaintiff, et. al, for a special prosecutor, the Hon. Mario Cuomo, Governor of the State of New York, appointed Attorney General Robert Abrams as special prosecutor to investigate the disappearance of Tawana Brawley. Prior to the appointment of Attorney General Abrams, two previously selected prosecutors -- William Grady and David Sall -- resigned citing unspecified conflicts-of-interests.

11. On or about February 29, 1988, Attorney General Abrams, before the assembled press, selected a grand jury to investigate the charges.

12. Thereafter, on October 6, 1988, at a mammoth press conference, Attorney General Abrams released the 170-page report of the grand jury investigating Ms.

Brawley's disappearance. At the same press conference, the Attorney General announced that he was filing a grievance against Ms. Brawley's attorneys, Plaintiff herein and Alton H. Maddox, Jr., Esq. At that time, Attorney General Abrams publicly disseminated over two-hundred copies of his ten-page complaint containing specific charges of professional misconduct against Messrs. Mason and Maddox. A copy of that complaint may be found in the Appendix to Mr. Mason's Motion For Permission To Appeal To the Court of Appeals of the State of New York, attached hereto as Exhibit A, at 000045 - 000054.

13. On or about October 14, 1988, Plaintiff Mason was served with an official letter from the Disciplinary Committee indicating that, "[b]ased upon publicly reported accounts," the Committee had

"commenced a sua sponte investigation into [plaintiff's] actions in connection with the Tawana Brawley matter." See Exhibit A at 000055. Neither the particular "publicly reported accounts" nor the specific actions of Plaintiff to which the Committee referred were identified in the letter. Rather, Plaintiff was directed to respond within twenty days "only to those allegations [contained in the publicly disseminated complaint of the Attorney General] that deal[t] with [Plaintiff's] conduct or involvement" in the Brawley matter. Id. Enclosed with the letter was a copy of the ten-page complaint of the Attorney General, accompanied by thirty-eight exhibits (consisting primarily of over one-hundred pages of largely illegible newspaper articles), and a copy of the 170-page report of the Grand Jury of Dutchess

County. Plaintiff was directed to address all inquiries to Alan S. Phillips.

14. Subsequent to service of the letter from the DDC, Mr. Mason twice sought -- by letters dated October 31, 1988, and November 4, 1988, see Exhibit A at 000056 and 000058-064, respectively -- and was twice denied a reasonable extension of time in which to respond to the lengthy complaint of the Attorney General. Among the grounds cited for said extension was (1) the ambiguity in the nature and extent of the Committee's inquiry, (2) the need to obtain and review the minutes of the Grand Jury of Dutchess County, upon which part of the Attorney General's complaint was based, and (3) the propriety of the complaint of the Attorney General and the Committee's adoption and pursuit thereof. Both denials for an extension of time were upon the

authority of William E. Jackson, Chairperson of the DDC.

15. Thereafter, on November 4, 1988, a response to the allegations of professional misconduct made by the Attorney General against Mr. Mason was submitted on his behalf. Exhibit A at 000062-068. Mr. Mason subsequently made a request to withdraw that response and to file anew pending his efforts to secure permanent counsel and to obtain and review the minutes of the Grand Jury of Dutchess County. See Exhibit A at 000069.

16. On or about November 18, 1988, Mr. Mason was served with a letter from Michael A. Gentile, as Chief Counsel to the DDC, directing him, inter alia, to respond to thirteen questions with respect to his legal representation and to submit a notice of appearance of his authorized counsel(s)

endorsed with his signature. See Exhibit A at 000070-072.

17. By letter dated November 21, 1988, counsel herein, in compliance with the request of Michael A. Gentile as Chief Counsel to the DDC, submitted a Notice of Appearance signed by Mr. Mason as authorizing their representation. Exhibit A at 000075. Said counsel renewed Mr. Mason's request for an extension of time and informed the Committee of their intention to file, on or before December 5, 1988, a motion, pursuant to NYCPL § 190.25, for disclosure of the minutes of the grand jury that was charged with the duty of investigating Ms. Brawley's disappearance. See Exhibit A at 000073-074. Said motion was duly filed on that date with the Supreme Court of Dutchess County, Judge Angelo Ingrassia presiding. See Exhibit A

at 000087. By order dated February 21, 1989, said motion was denied.

18. By letter dated December 8, 1988, counsel herein were advised by Michael A. Gentile, as Chief Counsel to the DDC, inter alia, that Mr. Mason's request for an extension of time was denied, that he must file any supplementary response to the November 4, 1988 submission by January 9, 1989, and that the DDC would not recognize Stephanie Y. Moore, Esq., as one of Mr. Mason's counsel as she is not admitted to the bar in New York. See Exhibit A at 000093-094.

19. On or about December 20, 1988, Mr. Mason, through counsel, petitioned the Appellate Division of the Supreme Court of the State of New York, First Judicial Department [hereinafter "Appellate Division"], pursuant to Article 78 of the

CPLR, for a writ of mandamus directing the DDC to reverse their decisions (1) denying Plaintiff's request for an extension of time in which to respond to allegations of professional misconduct made by Attorney General Robert Abrams, and (2) refusing to allow Stephanie Y. Moore, Esq., an attorney admitted to practice in the State of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, and the United States Courts of Appeals for the Third and Fourth Circuits, to proceed on Plaintiff's behalf. Plaintiff argued, inter alia, that the defendants's actions were arbitrary and in derogation of his constitutional right to due process. See Exhibit A 000001 et seq.

20. Thereafter, on or about December 21, 1988, Mr. Mason submitted to defendant Disciplinary Committee a formal complaint

of misconduct against Attorney General Abrams in connection with the investigation of the charges of racial and sexual assault on the minor child, Tawana Brawley. Said complaint charged, inter alia, that the Attorney General's public dissemination of the text of the complaint in flagrant disregard of the rules of defendant Disciplinary Committee constituted a violation of the disciplinary rules in that it was intentionally calculated to interfere with orderly and impartial functioning of the Committee. Receipt of the aforementioned confidential complaint against the Attorney General was acknowledged by letter to Plaintiff dated December 29, 1988, over the signature of then-Chief Counsel Michael A. Gentile. See Exhibit A at 000218.

21. On or about January 3, 1989, in

response to Mr. Mason's December 20, 1988 mandamus petition, the Committee cross-moved, upon the Affirmation and Verified Answer of Michael A. Gentile, for dismissal of that application for Article 78 relief. See Exhibit A at 000102. Paragraph 4 of the Mr. Gentile's Affirmation alleged that the Disciplinary Committee had commenced a "sua sponte" investigation into Mr. Mason's conduct in connection with his representation of Tawana Brawley on June 20, 1988. See Exhibit A at 000106. Attached as Exhibit A to Mr. Gentile's Affirmation was a document, written during the pendency of the grand jury investigation into Tawana Brawley's disappearance, from Mr. Gentile to the Attorney General. See Exhibit A at 000117. Specifically, said document was a "PERSONAL & CONFIDENTIAL" letter dated June

28, 1988, from Michael A. Gentile, as Chief Counsel to the DDC, to Attorney General Robert Abrams, then serving as special prosecutor to the Dutchess County Grand Jury. Said letter advises the Attorney General that the DDC had commenced an investigation into the conduct of Mr. Mason in connection with his representation of Tawana Brawley. Said letter further expresses interest in certain "information, statements and documents which would be relevant to [the DDC's] inquiry," and specifically solicits receipt of "any evidentiary materials presently available" to the Attorney General and his office. The letter advises that the DDC "will not take any steps at this time" but will "await the outcome of the grand jury's inquiry before proceeding further." Finally, the letter requests the Attorney

General's "immediate assistance and cooperation" to facilitate the DDC's "preparation for possible future action." The letter concludes with "Best regards," from Mr. Gentile, as Chief Counsel to the DDC, to the Attorney General.

22. On January 4, 1989, one day following the submission of the Committee's cross-motion, an exclusive news account in the Daily News reported that Mr. Gentile had resigned his post as Chief Counsel to the Disciplinary Committee effective February 1, 1989. See Exhibit A at 000202. At that time, Mr. Gentile's resignation was attributed solely to allegations that he had mishandled a disciplinary probe into the conduct of Joel Steinberg, a lawyer who had been recently convicted in connection with the death of the child he was raising.

23. On or about January 9, 1989, counsel for Mr. Mason submitted a Reply Affirmation in response to the Committee's January 3, 1989 notice of cross-motion. See Exhibit A at 000161. In addition, on or about January 6, 1989, based upon the aforementioned letter attached as Exhibit A to the January 3, 1989 Affirmation of Michael A. Gentile, Mr. Mason filed a second application seeking Article 78 relief. See Exhibit A at 00172. Said application sought an order directing the Committee (1) to dismiss the sua sponte complaint, docket no. 1233/88, against Mr. Mason, and (2) to disclose to Mr. Mason, through the process of discovery, any and all information concerning the nature and details of all communications with respect to complaint number 1233/88 between Michael A. Gentile, as Chief Counsel to the DDC,

and Attorney General Robert Abrams during the time period beginning June 28, 1988 and up to October 14, 1988. Mr. Mason's application also initially requested an order directing the Disciplinary Committee to stay any and all proceedings before it in connection with the grand jury investigation of the disappearance of Tawana Brawley, including but not limited to, (1) complaint number 1233/88 against Mr. Mason, (2) and his complaint dated December 21, 1988 against Attorney General Robert Abrams. Based upon discussions between counsel to both parties, however, the request for a stay was voluntarily stricken from the pleadings to expedite decision on the application.

24. By further consent of the parties, the two Article 78 applications of Mr. Mason were consolidated and made

returnable on January 30, 1989. Exhibit A at 000279.

25. On or about January 23, 1989, the DDC cross-moved, upon the Verified Answer and Affirmation of Richard M. Maltz, for dismissal of Mr. Mason's second Article 78 application. See Exhibit A at 000245.

26. On or about January 30, 1989, counsel to Mr. Mason filed a Reply Affirmation in response to the Committee's second notice of cross-motion. Thereafter, on January 31, 1989, two news accounts, appearing in the Daily News and the New York Law Journal ("Law Journal"), see Exhibit A at 000322 and 000323-329.reported for the first time that there were allegations of unethical conduct surrounding the DDC's investigation into Mr. Mason's representation of Ms. Brawley. Those allegations involved charges and

counter-charges of former Chief Counsel, Michael A. Gentile and Justice Frances T. Murphy, the Presiding judge of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

27. Specifically, following Mr. Gentile's sudden resignation in early January as Chief Counsel of the DDC, several prominent members of the New York legal community, including Special Prosecutor Charles J. Hynes and Administrator of the State Commission on Judicial Conduct, Gerald Stern, called for an explanation of what was then widely considered the forced resignations of Gentile and his deputy counsel, Diane McShea. See "Notice of Motion For Leave To Appeal," attached hereto as Exhibit B, at 000031.

On January 30, 1989, Judge Murphy, the presiding judge of the Appellate Division, -- which rules on sanctions imposed by the DDC -- answered that call in a report released that day commenting on the resignations of both Gentile and his deputy counsel.

29. The text of Justice Murphy's report, was published January 31, 1989, in its entirety in the Law Journal. See Exhibit A at 000325-329. Therein Justice Murphy expressed "concern" with respect to the handling of the disciplinary complaint filed against Mr. Mason by Attorney General Robert Abrams. Specifically, Justice Murphy stated that "reports of the absences and non-productivity of Mr. Gentile caused me concern upon the filing with the DDC in October 1988 of the complaints of the Attorney General of the State of New York

against C. Vernon Mason in the Brawley case, a filing that was made public by the Attorney General in an extensive release to the press." Id. at 000327. Justice Murphy charged that Gentile "was so frightened by the prospect of the Mason matter that he was inclined to find a way of avoiding it." Id.

30. In an interview with the Law Journal, Mr. Gentile counter-charged that "Judge Murphy's interference was aimed at thwarting our efforts to assure that Mason received the same due process afforded any lawyer facing charges of serious misconduct," and further rebuked the Justice for "open[ing] up to the public view a pending matter." See Exhibit A at 000324.

31. That controversy prompted the filing, on February 1, 1989, of an addendum

on behalf of Mr. Mason to counsels' Reply Affirmation of January 30, 1989. Exhibit A at 000317. Therein Mr. Mason argued that the ongoing controversy within and between the Appellate Division and its Disciplinary Committee had totally undermined his rights to due process and unalterably compromised his right to a fair and impartial tribunal. Immediately thereafter, the Committee filed an Affirmation in response to counsels' addendum asserting both procedural and substantive arguments in opposition to counsels' addendum. Id. at 000333.

32. On that same date, February 1, 1989, a New York Newsday ("Newsday") article entitled "Lawyers Say Firing Was 'Power Play'", see Exhibit A at 000331, reported that Mr. Gentile and his former deputy counsel had filed a complaint with the State Commission on Judicial Conduct

against Justice Murphy and his Chief Clerk, Harold Reynolds. Among the allegations reportedly made to the Judicial Commission was that "Justice Murphy and Reynolds . . . interfered improperly in the disciplinary process, directing staff and committee actions, in an effort to help their friends and punish their enemies." See id.

33. Shortly thereafter, the proposed official intervention of the Court of Appeals of the State of New York [hereinafter "Court of Appeals"] into the dispute was reported in The New York Times ("Times"). The Times article of February 4, 1989, "Wachtler to Act on Lawyers' Panel Fight," see Exhibit B at 000037, repeated the charges and counter-charges of Mr. Gentile and Justice Murphy and again cited the investigation of Mr. Mason's role in representing Tawana Brawley as one of the

critical elements of the dispute.

34. On February 16, 1989, the Chief Judge of the Court of Appeals, Sol Wachtler, in a public release in the Law Journal instructed the Appellate Division "as a Court" to "make inquiry with respect to the entire situation and promptly do whatever is necessary to maintain the dignity, respect and integrity" of that court and, "especially," its Departmental Disciplinary Committee. 35. The February 16th Law Journal article that accompanied the publication of Judge Wachtler's letter observed that the "exchange of charges between Justice Murphy and Mr. Gentile have [sic] raised questions about the handling of ongoing disciplinary investigations, including a complaint filed by State Attorney General Robert Abrams against C. Vernon Mason, one of the lawyers who

represented Tawana Brawley."

36. On or about February 17, 1989, in compliance with the directive of the Court of Appeals, Presiding Justice Murphy appointed four Appellate Division justices to investigate the controversy surrounding Mr. Gentile's resignation. Thereafter, on February 19, 1989, a Newsday article, "Judicial Factions In Split Over Probe," see Exhibit B at 000040, reported that the thirteen judges of the Appellate Division "are split into two factions on whether the judicial investigation looks like a 'whitewash.'" Similarly, unnamed members of the DDC reportedly questioned whether the investigation by the judges could be "vigorous, impartial or ethical." In addition, some question was raised as to the timing of the selection of the four judges by Justice Murphy, and whether any

of them had earlier drafted and considered sending a letter in support of Justice Murphy to the Court of Appeals. Criticism was also leveled against William E. Jackson, Chairperson of the DDC, for sending a letter on DDC stationery in support of Justice Murphy to the four-judge investigatory panel. That letter was published in its entirety by the Law Journal reportedly upon the request of Mr. Jackson. See Exhibit B at 000041.

39. Shortly thereafter, on February 22, 1989, the Appellate Division entered and filed two orders disposing of Mr. Mason's consolidated applications for Article 78 relief. See Exhibit B at 000027; 000028, were issued without opinion.

40. Specifically, the Appellate Division (1) granted Mr. Mason's petition

for reversal of the DDC's determination denying him an extension of time, directing instead that Mr. Mason respond to the complaint within 60 days of the date of the order; and (2) denied Mr. Mason's petition for reversal of the DDC's determination refusing to allow Stephanie Y. Moore, Esq., to proceed as counsel on his behalf, without prejudice to the submission of an application for pro hac vice admission. See Exhibit B at 000027. Said application was duly made on or about February 29, 1989, and subsequently granted by order dated April 12, 1989, attached hereto as Exhibit C.

41. By separate order, the Appellate Division further (1) denied Mr. Mason's requests for dismissal of the complaint; and (2) refused to grant him discovery of certain communications between Michael A.

Gentile, as Chief Counsel to the DDC, and the Attorney General of the State of New York, Robert Abrams. See Exhibit B at 000028. Notice of Entry of both orders was served upon counsel to Mr. Mason on or about February 27, 1989.

42. On February 21, 1989, just prior to the decisions by the Appellate Division denying Article 78 relief, Mr. Mason's Motion for Disclosure of the Grand Jury minutes was denied by Judge Ingrassia. On or about February 27, 1989, based upon the controversy within and among the Appellate Division and its Disciplinary Committee. Mr. Mason filed a Motion to Renew the previous,motion for disclosure. Said motion to renew was argued before Judge Ingrassia on March 29, 1989, and subsequently denied by order dated May 18, 1989.

43. Meanwhile, on or about March 3, 1989, Chief Clerk to Justice Murphy, Harold J. Reynolds, resigned amid allegations that he personally interfered with two high profile disciplinary investigations. See Exhibit B at 000043-044.

44. Public accounts on the internal investigation ordered by Judge Wachtler indicate that the justices of the Appellate Division apparently heard unsworn testimony from several witnesses. On March 17, 1989, the Law Journal reported that notwithstanding the appointment of the four-judge panel by Justice Murphy, all of the associate justices were participating in the questioning of witnesses. See Exhibit B at 000042. Among those interviewed by the justices were Harold Reynolds, former Chief Clerk of the Appellate Division, Mr. Gentile and Ms.

McShea.

45. On or about April 6, 1989, Justice Murphy reportedly answered questions from his fellow Appellate Division justices in a session described by a source as 'not too rigorous.' See Exhibit D.

46. On or about March 23, 1989, Mr. Mason filed with the Court of Appeals a Motion for Leave to Appeal the unanimous orders, without opinion, of the Appellate Division, denying his requested Article 78 relief. See Exhibit B. Therein Mr. Mason noted, inter alia, the pendency of the internal investigation of the Appellate Division and his due process right to review the final report of the Appellate Division to determine whether the procedures employed by that court were impartially implemented, and whether his

rights were adequately protected thereby. See Exhibit B at 000018.

47. Subsequently, on or about April 28, 1989, the report of the Appellate Division on its internal investigation was released to the public and published in its entirety in the Law Journal.. That report, attached hereto as Exhibit E, endorsed by all but one of the Appellate Division's associate justices, focused primarily on procedural questions and the resignations of Mr. Gentile and his deputy counsel. With respect to the allegations of misconduct, the report summarily concludes "that neither the Presiding Justice nor any other member of this Court directed or otherwise participated in the investigation, prosecution or disposition of any disciplinary matter." The dissent, without explanation, found both the forced

resignation "wrong and its manner of execution terribly wrong."

48. Chief Judge Sol Wachtler, on behalf of the Court of Appeals, issued a letter to the Appellate Division justices, also published by the Law Journal, expressing that Court's satisfaction "that the objectives sought by the process have been met," yet "returning the underlying transcripts and exhibits" without reviewing them. Based upon public accounts, the Court of Appeals declined to examine the underlying evidence because of a potential conflict should Court be called upon to review the related case against Justice Murphy pending before the New York State Commission on Judicial Conduct. See Exhibit F.

49. Thereafter, by order dated May 4, 1988, Mr. Mason's motion for leave to

appeal to the Court of Appeals was denied. See Exhibit G.

50. Throughout the pendency of the aforementioned litigation, the Disciplinary Committee has proceeded with its investigation into the allegations made by Attorney General Robert Abrams. By letter dated March 14, 1989, the Committee indicated its desire to speak with Tawana Brawley "[i]n order that a thorough investigation is conducted," and requested that Mr. Mason "communicate to Ms. Brawley [its] request for her cooperation." See Exhibit H.

51. By letter dated, March 15, 1989, the Committee served upon counsel to Mr. Mason a Judicial Subpoena Duces Tecum, attached hereto as Exhibit I, requesting, inter alia, Mr. Mason's "complete file relating to the representation of Glenda

Brawley and Tawana Brawley." Said subpoena was subsequently withdrawn.

52. By letter dated May 1, 1989, relevant portions thereof attached hereto as Exhibit J, Counsel accepted service of a second Judicial Subpoena Duce Tecum For Mr. Mason's oral testimony pursuant to said subpoena presently scheduled for May 26, 1989.

53. The publication of the disciplinary complaint against Mr. Mason by the Attorney General was malicious, unethical and designed to prejudice the anticipated proceedings against him.

54. The publication of the disciplinary complaint against Mr. Mason by the Attorney General was malicious, unethical, politically motivated and designed to harass and to chill the First Amendment rights of Mr. Mason and other

activist attorneys to criticize government officials by singling out Mr. Mason and fellow attorney, Alton H. Maddox, Jr., for harsh and discriminatory treatment. The adoption and pursuit of said complaint by defendant Disciplinary Committee is in furtherance of said impermissible objective. Said publication is in violation of Mr. Mason's rights to due process in that it was designed to and has had the effect of depriving him of an impartial tribunal.

55. The interjection of disciplinary considerations into the underlying grand jury investigation into the disappearance of Tawana Brawley by the Office of Chief Counsel was in bad faith and/or prejudiced Mr. Mason's right to due process, in that said interjection was designed to and/or had the effect of shifting the focus of the

investigation towards amassing evidence against Mr. Mason.

56. The interjection of disciplinary considerations into the underlying grand jury investigation into the disappearance of Tawana Brawley by the Office of Chief Counsel was designed to and/or had the effect of discrediting the charges of Ms. Brawley in order both to silence the advocacy on her behalf and to bolster the anticipated charges of misconduct against her attorneys.

57. The adoption and pursuit of the publicly disseminated complaint of the Attorney General by the Disciplinary Committee was in bad faith and in derogation of Mr. Mason's right to due process in that that Committee knew or should have known of the ethical improprieties in the public dissemination

of said complaint.

58. The continuing public controversy within and between the Appellate Division and the Disciplinary Committee has further and completely deprived Mr. Mason of his rights to due process and an impartial tribunal.

59. The internal investigation of the Appellate Division was pursued in bad faith and/or without regard to the due process rights of Mr. Mason. The published report thereof, reportedly based primarily upon unsworn testimony, is unreliable due to an inherent conflict of interest.

60. As a result of the foregoing, the conduct of the investigation of Mr. Mason has been arbitrary, capricious and in derogation of his rights to due process, an impartial tribunal, and free speech.

CAUSES OF ACTION

Count One

61. Plaintiff restates and realleges paragraphs 1 through 60 as if each were fully set forth here.

62. The malicious and unethical publication of the disciplinary complaint against Mr. Mason by the Attorney General and the ensuing controversy within and between the Appellate Division and Defendant Disciplinary Committee has completely deprived Mr. Mason of his rights to due process and an impartial tribunal as guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

Count Two

63. Plaintiff restates and realleges paragraphs 1 through 60 as if each were fully set forth here.

64. Defendants' solicitation,

adoption, and/or pursuit of the maliciously and unethically published complaint of the Attorney General is in bad faith and/or in derogation of Plaintiff's right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1983.

Count Three

65. Plaintiff restates and realleges paragraphs 1 through 60 as if each were fully set forth here.

66. Defendants' solicitation, adoption, and/or pursuit of the maliciously and unethically published complaint of the Attorney General is designed to harass Plaintiff in derogation of Plaintiff's right to freedom of speech as guaranteed by the First Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court

1) enter an order preliminarily and permanently enjoining defendants from proceeding upon complaint number 1233/88 against plaintiff, C. Vernon Mason, Esq., and

2) for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
May , 1989

Respectfully submitted,

WILLIAM M. KUNSTLER, Esq.
RONALD L. KUBY, Esq.
13 Gay Street
New York, NY 10014
(212) 924-5661

Of Counsel:
Stephanie Y. Moore, Esq.
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6437

Attorneys for Plaintiff

No. 89-1752

IN THE

Supreme Court of the United States

October Term, 1989

C. VERNON MASON,

Petitioner,

against

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; OFFICE OF CHIEF COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STROOCK & STROOCK & LAVAN
Attorneys for Respondents
Seven Hanover Square
New York, New York 10004
(212) 806-5400

JAMES G. GREILSHEIMER
Counsel of Record

ALAN M. KLINGER
JOSEPH J. GIAMBOI
Of Counsel

June 11, 1990

QUESTION PRESENTED FOR REVIEW

Whether the affirmance by the Second Circuit of the district court's dismissal of petitioner's complaint pursuant to the abstention principles set forth in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), was correct when the investigation of petitioner by the Disciplinary Committee's staff, preceding any charges which might be brought against him, is only in its infancy; when petitioner will have an adequate opportunity in any state disciplinary proceedings and state judicial proceedings therefrom to raise constitutional or other challenges to such proceedings; and when petitioner failed to allege facts sufficient to establish bad faith, harassment or other extraordinary circumstances by the Disciplinary Committee to warrant the exercise of federal jurisdiction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases: (cont.)

Statutes

No. 89-1752

IN THE

Supreme Court of the United States

October Term, 1989

C. VERNON MASON,

Petitioner,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; OFFICE OF CHIEF COUNSEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the Departmental Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Office of Chief Counsel, ("Respondents"), respectfully urge that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit (the "Second Circuit").[1] Petitioner, C. Vernon Mason, has failed to establish any basis upon which the writ should be granted in that the

[1] The Second Circuit's opinion and judgment are reprinted in the Appendix to the Petition of C. Vernon Mason (the "Petition"), at pages A-1-21. Parenthetical citations preceded by "A" refer to the Appendix to the Petition; those preceded by "J.A." refer the first, second and third volumes of the Record on Appeal filed in the Second Circuit.

Second Circuit's decision is fully consonant with the prior decisions of this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971); *Kugler* v. *Helfant*, 421 U.S. 117, *reh'g denied*, 421 U.S. 1017 (1975); and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982).

The proceeding that Mr. Mason seeks to enjoin remains only in the most preliminary stage of investigation and no determination has been made by the Committee to seek a disciplinary sanction against Mr. Mason. The procedures established for the conduct of the investigation, the Committee's initial step in the disciplinary process, and for the hearing that would follow in the event formal charges are preferred against Mr. Mason, have been so designed by the State of New York as to protect the substantial interests of all the parties to the litigation.

Pursuant to these procedures, the Committee will have an opportunity to ascertain whether Mr. Mason has violated the standards of professional responsibility which the courts of the State of New York and the people of the State of New York expect its attorneys to maintain. Similarly, Mr. Mason will have an opportunity to explain or to contest any allegations pertaining to his conduct and will have a full and fair opportunity to litigate any perceived infringement of his constitutional rights.

Mr. Mason does not allege facts sufficient to warrant this Court's departure from the general policy of deferring to state courts the discipline of their respective attorneys. Stripped of its conclusory allegations, Mr. Mason's claim appears to be that:

(1) because the Committee alerted New York State Attorney General Robert Abrams to the fact that it had opened an investigation file concerning Mr. Mason and asked to receive relevant evidence against Mr. Mason (in a letter marked "Personal and Confidential");

(2) because Attorney General Abrams publicly announced that he was charging Mr. Mason with conduct violative

of the Code of Professional Responsibility and then publicly disseminated the letter that he was sending to the Committee enumerating the allegations; and

(3) because Justice Francis T. Murphy, in his capacity as Presiding Justice of the Appellate Division, and as such, the Justice empowered to oversee the Committee and the attorney disciplinary process generally, pressed the Committee's then Chief Counsel, Michael Gentile, to move the Mason matter;

he cannot receive a fair and impartial hearing on as yet unbrought charges in the courts of the State of New York, thus violating Mr. Mason's constitutional right to due process.

As shown, Mr. Mason bases this belief on the alleged acts of three individuals—Attorney General Abrams, Justice Murphy and Mr. Gentile—only one of whom, Justice Murphy, may have a role to play in the disciplinary process (and even that possibility is remote). Considering that there is no charge that any of the 36 members of the Committee, the current Chief Counsel or any of the attorneys employed by the Chief Counsel, or, for that matter, that 12 of the 13 Justices of the Appellate Division available to sit on the panel of five to consider such charges (assuming any are brought and referred to the Court), committed any improper acts, Mr. Mason's complaint, on its face, fails to state a claim of bad faith, harassment, or extraordinary circumstances sufficient to warrant the exercise of federal jurisdiction in this case. *See Kugler*, 421 U.S. 117. Denial of the writ, therefore, is appropriate.

STATEMENT OF THE CASE

Solely for purposes of their motion to dismiss and their opposition to Mr. Mason's motion for a preliminary injunction, respondents accepted the facts as set forth in the complaint as true. They are restated here without hyperbole for the convenience of the Court and to demonstrate, by placing them in proper perspective, the lack of any factual or other basis for the relief which Mr.

Mason seeks. Additionally, to place these matters in context, the rules and procedures governing the Committee's investigation and prosecution of disciplinary actions against First Department lawyers are also fully described in the affidavit of its present Chief Counsel, Hal R. Lieberman, previously submitted to the district court and appended hereto in the Supplementary Appendix ("S.A.").

i. **The Brawley Case**

In the autumn of 1987 Tawana Brawley was discovered outside an apartment complex in Wappingers Falls, New York lying inside a garbage bag. At that time, she claimed that she had been abducted and sexually assaulted by several white men, one of whom displayed a policeman's badge. (J.A.I-3.)

Soon thereafter, Mr. Mason and Alton H. Maddox, Jr., Esq., became legal advisers to Ms. Brawley. At their prompting, Governor Mario Cuomo agreed to appoint a special prosecutor to investigate Ms. Brawley's claims of abduction and rape. Governor Cuomo appointed the Attorney General of the State of New York to fill that position. (J.A.I-4.)

Assuming this role, Attorney General Abrams empaneled a Grand Jury in February 1988 to investigate the incident and sought the cooperation of Ms. Brawley and her mother in the investigation. (J.A.I-4, *see also* 72-74.) For approximately eight months, until the Grand Jury issued its report in October 1988, Attorney General Abrams sought, and Ms. Brawley's legal advisers fought, Ms. Brawley's and her mother's participation in the investigation of the alleged crimes. Various charges were hurled by Ms. Brawley's advisers regarding the Attorney General's motivations for seeking the Brawleys' assistance, but, in the end, despite a subpoena from the Grand Jury to Ms. Brawley's mother seeking her appearance, neither Ms. Brawley nor her mother testified before the Grand Jury.

On October 6, 1988, the Grand Jury released the report of its investigation into the matter. (J.A.I-4-5.) The Grand Jury con-

cluded that public charges made by Ms. Brawley's legal advisers and others acting on her behalf, including the charges that certain named individuals had participated in the attack on Ms. Brawley, were without basis in fact.[2]

With the report of the Grand Jury in hand, Attorney General Abrams announced publicly that he would ask the disciplinary committees with jurisdiction over Messrs Maddox[3] and Mason to consider bringing disciplinary proceedings against them. In a letter dated October 6, 1988, Attorney General Abrams set forth his charges against Messrs. Maddox and Mason and alleged that they had breached four Disciplinary Rules of the Code of Professional Responsibility. (J.A.I-4-5.) Attorney General Abrams alleged that the two attorneys knowingly made false statements in the course of representing Ms. Brawley and her mother, counseled Ms. Brawley's mother to disobey a subpoena to appear before a grand jury, and assisted her to evade arrest. (J.A.I-168-77.)

ii. **The Committee's Investigation**

Attorney General Abrams's October 6, 1988 letter to the Committee became part of an existing file on Mr. Mason in this matter. The Committee had opened the file in June 1988 when,

---

[2] *See* Report of the Grand Jury of the Supreme Court State of New York, County of Dutchess, Oct. 6, 1988, at 168-69, included at (J.A.II-96-269.)

[3] Mr. Maddox is not subject to the jurisdiction of the Committee, although he did apparently seek to change the venue of his disciplinary hearing to this Committee. Mr. Maddox apparently sought this change because he believed that the Grievance Committee under whose jurisdiction he is, was guilty of racial discrimination, bias and hostility towards him. *See* Matter of Alton H. Maddox, N.Y.L.J., May 22, 1990, at 6, col. 3 (App. Div. 2d Dep't.)

Mr. Maddox also had commenced an action in the Eastern District of New York to enjoin the Grievance Committee (for the Second and Eleventh Judicial Districts) from pursuing its inquiry into his actions with respect to the Tawana Brawley matter. Mr. Maddox, in that action, advanced the claim that he could not receive a fair hearing due to the actions of Attorney General Abrams, which, he claimed, had the effect of biasing the state judicial system against him. That action, too, was dismissed by the district court (Glasser, J.) and sanctions were imposed pursuant to Fed.R. Civ. P. 11. *See Maddox* v. *Mollen*, No. CV-89-4181 (E.D.N.Y. Mar. 28, 1990) (1990 WESTLAW 39869.)

pursuant to 22 NYCRR § 605.6(b)(2), it had commenced a *sua sponte* investigation of Mr. Mason's conduct during the Brawley investigation. (J.A.I-51.) The Committee's investigation was begun as a result of a flood of newspaper articles, television news reports and radio broadcasts about the controversy surrounding the Grand Jury investigation. (*Id.*) Moreover, during this time, the Committee was inundated with telephone calls requesting an investigation of Mr. Mason's conduct. In particular, on June 20, 1988, five members of the Assembly of the State of New York had requested that the Committee commence an investigation of Mr. Mason's conduct because they believed that he and Ms. Brawley's other advisers had acted improperly throughout the investigation. (J.A.I-43-44.)

On June 28, 1988, as part of its normal investigatory procedures, the Committee's then Chief Counsel sent Attorney General Abrams a letter notifying him that it had commenced an investigation of Mr. Mason and requesting the production of relevant materials and documents for possible action following the conclusion of the Grand Jury's investigation. (J.A.I-44.) In this context, Attorney General Abrams's October 6, 1988 letter served to inform the Committee of the termination of the Grand Jury's investigation as well as to register a complaint of professional misconduct against Mr. Mason. Because the letter set forth in detail much of Mr. Mason's purportedly "questionable" behavior (as contrasted with the more general letter previously sent by the Assemblymen), the Committee utilized Attorney General Abrams's letter to serve as the vehicle for conveying to Mr. Mason the conduct about which it was concerned.[4] (J.A.I-45.) The letter did *not* constitute the filing of formal charges by the Committee against Mr. Mason in the sense of institution of a formal proceeding. Rather, as was recognized by the Second Circuit (A-14), it

---

[4] This is a customary practice of the Committee when the complainant's letter is clear and specifies those actions which cause the Committee concern. *See* J.A.II-46-47; Practicing Law Institute, *Legal Ethics: Everything a Lawyer Needs to Know and Should Not be Afraid to Ask*, 191 (1988).

was no more than an instrument which the Committee used to further its investigation pursuant to 22 NYCRR § 605.6.[5] The Committee requested that Mr. Mason respond to its inquiry within the standard 20 days (by November 4, 1988). (J.A.I-45.)

On November 2, 1988, the Committee received a letter from Napoleon B. Williams, Jr., Esq. and Stephanie Y. Moore, Esq. requesting, on behalf of Mr. Mason, a 90 day extension of time to answer the concerns raised in Attorney General Abrams's letter. In large part because their letter was equivocal as to their authority to represent Mr. Mason (*see* J.A.I-155), the Committee the next day denied the request and, in its letter so informing Mr. Williams and Ms. Moore, sought to clarify whether they in fact were authorized to represent Mr. Mason. (J.A.I-46.) Mr. Williams, on November 4, 1988, purportedly on Mr. Mason's behalf, submitted a response. (J.A.I-99.)

Within ten days, there commenced an exchange of correspondence, initially between the Committee and Mr. Mason, and eventually involving new counsel, William M. Kunstler, Esq. and Ronald L. Kuby, Esq., and Ms. Moore. (J.A.I-107.) In sum, Mr. Mason's new counsel attempted to withdraw the response submitted by Mr. Williams and to obtain an extension of time to submit a new response. The Committee sought to determine who represented Mr. Mason during this period, to advise him that Ms. Moore, having never been admitted to practice in New York, could not act as counsel to him, and declined to allow him to withdraw the November 4, 1988 response, at least absent adequate explanation. Mr. Mason's new counsel advised the Committee that they had counseled Mr. Mason not to answer any inquiries regarding Mr. Williams's representation.

On December 8, 1988, the Committee reiterated to Mr. Mason that it would not allow him to withdraw his response of No-

---

[5] In the event that the Committee formally charges Mr. Mason with misconduct, it will prepare and serve a formal Notice and Statement of Charges and Attorney General Abrams's letter will no longer be legally relevant. *See* 22 NYCRR § 605.12.

vember 4, 1988, but that it would give him until January 9, 1989 to submit a supplemental response. (J.A.I-7.) Mr. Mason rejected the Committee's offer and also insisted that Ms. Moore should be allowed to act as counsel in the matter. On December 20, 1988, he commenced a proceeding in the Appellate Division pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78 proceeding") against the Committee for a judgment directing the Committee to grant him an extension of time to respond to Attorney General Abrams's letter of complaint and to recognize Ms. Moore as one of his attorneys.[6] (J.A.I-7-8.) The Committee responded by cross-moving for dismissal of the entire action.

On January 5, 1989, Mr. Mason commenced a second Article 78 proceeding in the Appellate Division against the Committee (J.A.I-10-11), apparently as a result of the reports of the requested resignation of the Committee's then Chief Counsel, Michael A. Gentile. (J.A.I-10.) By this action, Mr. Mason sought an order directing the Committee to cease the investigation into Mr. Mason's activities, charging that the investigation was biased and violative of his right to due process, and directing the Committee to disclose any and all information regarding communications between Mr. Gentile and Attorney General Abrams concerning the investigation into Mr. Mason's activities. (J.A.I-10-11.)

The parties agreed to consolidate these actions and the Committee subsequently responded to the second action by cross-moving to dismiss it, as well as the first, on both procedural and substantive grounds. (J.A.I-320-22.)

---

[6] The very next day, Mr. Mason submitted a complaint to the Committee against Attorney General Abrams regarding the latter's publication of the allegations against him. Oddly enough, Mr. Mason publicized the filing of the complaint. (J.A.II-46.) After a full investigation, the Committee, in June 1989, determined that there was no basis for taking action. (J.A.III-155.)

Mr. Mason's complaint, Attorney General Abrams's answer, Mr. Mason's response and the Committee's determination were submitted under seal to Judge Sprizzo and the Second Circuit prior to these courts' determinations in the matter.

On February 22, 1989, the Appellate Division rendered decisions in both Article 78 proceedings. In the first, the court essentially granted the entire relief Mr. Mason had sought. The court allowed him 60 days to submit a response to the complaint filed by Attorney General Abrams and, while declining to then approve Ms. Moore's status as counsel, indicated that Ms. Moore would be permitted to represent Mr. Mason upon submission of a proper application for *pro hac vice* admission. (J.A.I-453.) In the second, it rendered a decision dismissing Mr. Mason's petition (and charges of conspiracy and due process violations) without opinion. (J.A.I-455.)[7] The Committee then renewed its efforts to continue its investigation. As the time drew near for Mr. Mason to respond to the allegations and to appear for a deposition before the Committee, he instituted this action. (J.A.I-48.) The parties stipulated before the district court that Mr. Mason's response and appearance would be deferred pending the district court's determination. As also stipulated, the investigation, to the limited extent possible, continued.

iii. **The Gentile Matter**

As referenced above, at the request of Justice Murphy, Mr. Gentile resigned his position on January 23, 1989, effective March 1, 1989. (J.A.I-409.) Initially, the media reported that the request for the resignation was due to Mr. Gentile's alleged mishandling of another investigation and disciplinary proceeding. (J.A.I-10.) However, subsequent reports in the press indicated that there were additional reasons for the requested resignation. By the end of January 1989, there was speculation in the press that Mr. Gentile's resignation was requested because of inadequate performance in connection with various investigations, including that of Mr. Mason. (J.A.I-11.)

---

[7] Approximately one month later, on March 23, 1989, Mr. Mason sought leave from the New York Court of Appeals to appeal the Appellate Division's determinations. (J.A.I-426-450.) On May 4, 1989, Mr. Mason's motion for leave to appeal was denied. (J.A.I-18-19.) Mr. Mason, to the Committee's knowledge, did not seek certiorari.

In an effort to quell the rising tide of speculation, Justice Murphy released a report on January 23, 1989 explaining why he had requested Mr. Gentile's resignation. As is evident from that report, Justice Murphy was concerned that the Committee was not being properly administered, that a backlog of cases was growing, and that the increasing backlog of cases was causing many cases to slip through without thorough investigations occurring. (N.Y.L.J., Jan 31, 1989, at 24, col. 2.)

Mr. Gentile countercharged that this was not the case. He conclusorily alleged that Justice Murphy had attempted to interfere with the investigation of Mr. Mason so as to deprive Mr. Mason of the same due process rights afforded any other lawyer under investigation. (J.A.I-13.) On January 23, 1989, Mr. Gentile filed a complaint with the New York State Commission on Judicial Conduct against Justice Murphy and the Chief Clerk of the Court. (J.A.I-13-14.)

On February 16, 1989, Chief Judge Wachtler of the New York Court of Appeals directed the Appellate Division, First Department to "make inquiry with respect to the entire situation and promptly do whatever is necessary to maintain the dignity, respect and integrity" of the Court and its Committee. (N.Y.L.J., Feb. 16, 1989, at 1, col. 3; *see* J.A.I-473.) The Appellate Division thereupon commenced an inquiry into the matter. All of the 12 associate justices of the Appellate Division participated in the questioning of the various witnesses called to testify during the inquiry. Among those called as witnesses were Justice Murphy, Mr. Gentile, the Chief Clerk of the Court, who had resigned during the investigation, and Mr. Gentile's former assistant who had also resigned. (J.A.I-17.)

On April 28, 1989, the Appellate Division issued the report of its internal investigation. But for a lone dissenter, who objected to the manner of Mr. Gentile's resignation, all of the other Appellate Division Justices found that Justice Murphy had acted properly and that he had not improperly participated in the

investigation, prosecution or disposition of *any* disciplinary matter. (J.A.I-18.) Chief Judge Wachtler, on behalf of the Court of Appeals, accepted the report and sent a letter expressing the Court of Appeals's satisfaction with the Appellate Division's report. (*See* J.A.I-18 and J.A.II-276-277.)

ARGUMENT

ESTABLISHED SUPREME COURT PRECEDENT COMPELS ABSTENTION IN THE INSTANT MATTER AND DENIAL OF THE WRIT OF CERTIORARI

Petitioner has failed to establish any basis for this Court to grant his petition for a writ of certiorari.[8] The only basis upon which he appears to claim that this Court should grant the writ is that the Second Circuit "decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1. In fact, the Second Circuit's decision is entirely consistent with this Court's prior decisions in *Younger* v. *Harris*, 401 U.S. 37 (1971), *Kugler* v. *Helfant*, 421 U.S. 117 (1975), and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982).

A. The Principles Of Abstention As Set Forth In *Younger* And Applied In *Middlesex* Govern The Instant Matter

In *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, Lennox Hinds, a New Jersey attorney who was serving as executive director of the National Conference of Black Lawyers, participated in a news conference at the outset of the trial of Joanne Chesimard for the murder of a policeman. During the course of the conference, Hinds made statements critical of the

---

[8] Petitioner mistakenly asserts that this Court's jurisdiction is based on 28 U.S.C. §1257, which is concerned with appeals from state courts. The basis of this Court's jurisdiction is 28 U.S.C. §1254.

trial and the trial judge, at one point labeling the trial as a "travesty" and a "legalized lynching." *Id.* at 428.

The attorney's behavior was brought to the attention of the ethics committee and an investigation was commenced. At the conclusion of its investigation, the ethics committee determined that there was probable cause to believe that the attorney had violated certain Disciplinary Rules of the Code of Professional Responsibility and thus served the attorney with formal charges. Instead of responding to the charges, the attorney filed suit in federal court in New Jersey. That court dismissed the case based on *Younger*. The Third Circuit Court of Appeals reversed, reasoning that the disciplinary proceeding would not provide the attorney with an opportunity to fully litigate his constitutional claims. *Garden State Bar Ass'n* v. *Middlesex County Ethics Comm.* 643 F.2d 119, *reh'g denied*, 651 F.2d 154 (3d Cir. 1981). This Court reversed.

This Court declared that the policies underlying *Younger* are fully applicable to disciplinary proceedings when the answers to the following questions are in the affirmative:

> [F]irst, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

457 U.S. at 433. Here, the answers are all in the affirmative, thus the decisions of the courts below are entirely consonant with the precedent of this Court. *See Trainor* v. *Hernandez*, 431 U.S. 434, 447 (1977).[9]

---

[9] *See also Juidice* v. *Vail*, 430 U.S. 327 (1977); *Kugler* v. *Helfant*, 421 U.S. 117 (1975); *Davis* v. *Lansing*, 851 F.2d 72 (2d Cir. 1988); *Anonymous* v. *Ass'n of the Bar, 515 F.2d 427 (2d Cir.), cert. denied*, 423 U.S. 863 (1975) (all cases affirming dismissal upon application of *Younger*).

As to the first of these questions, petitioner now concedes that the conduct of disciplinary proceedings in New York clearly constitutes judicial proceedings. *See* Petition at 29 n.13; *see also Zimmerman* v. *Grievance Comm.* 726 F.2d 85, 86 (2d Cir.), *cert. denied*, 467 U.S. 1227 (1984); *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976). As to the second question, petitioner also concedes that the exercise of this authority is in the pursuit of an extremely important interest to the State of New York, the maintenance of the professional conduct of the attorneys it licenses. *See* Petition at 29 n.13. As this Court noted in *Middlesex*, states have traditionally exercised extensive control over the professional conduct of their attorneys in an effort to protect the judicial system and the public from unethical conduct by attorneys. *See* 457 U.S. at 435.

It is in response to the third question that petitioner joins issue, contending that he will not have an opportunity to raise his claims that various persons acted improperly in the state proceedings. This, however, confuses the issue at bar. For the issue is not whether the focus of the inquiry should be on the wrongful conduct of other parties, *see* Petition at 27; rather the issue is whether the petitioner, in confronting allegations made against him, is offered the opportunity in the state proceedings to raise any constitutional defenses. Here, Mr. Mason is free to raise in the state disciplinary proceedings any perceived violations of his constitutional rights, Federal or State, whether with respect to the disciplinary rules on their face or in their application to him. New York courts have clearly established that Mr. Mason may raise constitutional issues before the Committee in answering any formal charges brought against him, before a hearing panel of Committee members, before the Appellate Division, before the New York Court of Appeals and, possibly, before this Court. *See Turco* v. *Monroe County Bar Ass'n*, 554 F.2d 515, 519 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Anonymous*, 515 F.2d at 432; *Erdmann*, 458 F.2d at 1211; *Matter of Capoccia*, 59 N.Y.2d 549,

553, 453 N.E. 2d 497, 498 (1983); *Anonymous Attorneys* v. *Bar Ass'n*, 41 N.Y.2d 506, 509-12, 362 N.E.2d 592, 594-97 (1977).

Thus, the policies underlying *Younger* are fully applicable in the instant matter. In *Younger*, this Court emphasized the basic doctrine of equity jurisprudence "that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43-44. *Accord Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 600-01, *reh'g denied*, 421 U.S. 971 (1975). This policy is reinforced "by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions . . . ." *Younger*, 401 U.S. at 44. As the Court stated in *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 (1965), it is generally to be presumed that state courts and prosecutors will observe constitutional limitations.[10]

Beyond its confidence that the state courts will abide by the Constitution, this Court has encouraged abstention as part of a "scrupulous regard [for] the rightful independence of state governments." *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977) (quoting *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941)). Thus, this Court clearly teaches that the relief sought here should not be granted

> except under extraordinary circumstances, when the danger of irreparable loss is both great and immediate. . . . The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.

---

[10] Mr. Mason claimed below that one of the irreparable harms that he would suffer if the district court's dismissal of this case is affirmed is that he would be required to litigate his Constitutional claims in state court. (J.A.II-24.) As is apparent from *Dombrowski* and successive opinions of this Court, such a claim does not suffice to warrant the exercise of federal jurisdiction. The Court has repeatedly expressed confidence that state courts will exercise their authority consistent with the supremacy clause. *See, e.g., Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15 (1987).

Younger, 401 U.S. at 45 (quoting *Fenner* v. *Boykin*, 271 U.S. 240, 243-44 (1926); *see also Huffman*, 420 U.S. at 601; *Davis*, 851 F.2d at 76.

B. Petitioner's Claims Fail To Establish The Bad Faith Of The Committee In Commencing This Action, Harassment Or Extraordinary Circumstances Warranting The Exercise Of Federal Jurisdiction

There is no dispute that *Younger* permits federal intervention where there is a showing of bad faith or harassment by state officials responsible for the prosecution, where the state law to be applied is flagrantly and patently violative of express constitutional provisions, or where there exists extraordinary circumstances which create irreparable harm to Mr. Mason. *See* 401 U.S. at 54; *see also Kugler*, 421 U.S. at 124.[11] The dispute in the instant matter is whether petitioner adequately pleaded *facts*—not innuendo and conclusions—that show that the Committee was proceeding against him in bad faith. The courts below correctly ruled in the negative.

First, as a preliminary matter (and as the only new matter raised in the Petition), Mr. Mason argues that the courts below utilized too stringent a standard in rejecting his request for a preliminary injunction. Mr. Mason contends that "(his) overwhelming objective evidence of misconduct and bias" should have shifted the burden to the Committee to rebut the inference of prejudice. *See* Petition at 41. The problem for petitioner, how-

[11] Petitioner does not allege that the state law to be applied is unconstitutional.

ever is that he totally fails to show facts of bias.[12] In the instant matter, the Second Circuit concluded upon a review of the entire record that a showing of bias was lacking. It declared:

> In sum, Mason has alleged **no circumstances** that show that the Committee or the state courts are proceeding against him in bad faith or harassing him, nor has he alleged any other valid grounds for an exception to *Younger* abstention. The District Court was entirely correct in its conclusion that Mason's complaint did not require an evidentiary hearing and that the complaint should be dismissed.

(A-19-20) (emphasis supplied.)[13]

Shorn of the complaint's conclusory allegations, petitioner's claim, as best it can be parsed, is that the acts or statements of

---

[12] Petitioner's reliance on *Lewelien* v. *Raff*, 851 F.2d 1108 (8th Cir. 1988), *cert. denied*, ____U.S.____, 109 S. Ct. 1171 (1989); *Smith* v. *Hightower*, 693 F.2d 359 (5th Cir. 1982); and *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir.), *reh'g denied*, 597 F.2d 772 (1979), thus is to no avail. In these cases, the courts, in considering whether a preliminary injunction should issue, first required the movant to show that an impermissible purpose motivated the prosecution sought to be enjoined. *See Lewellen*, 851 F.2d at 1110; *Smith*, 693 F.2d at 367; *Wilson*, 593 F.2d at 1382-3. Here, Mr. Mason has made no such showing; all that he offers are unsupported—and insupportable—inferences of misconduct and speculative conclusions that he claims prove the case. However, *Smith* v. *Hightower*, 693 F.2d 359, itself, cautions against confusing "rumor and gossip" with facts (693 F.2d at 374), and the use of "pyramidal inferences" (*id.* at 370), stating: "[w]e are concerned that district courts not allow the bad faith or retaliatory prosecution exception to the *Younger* doctrine to swallow the rule of that case." *Id.* at 375.

[13] Moreover, even under the traditional injunction analysis, Mr. Mason's application for such relief below must fail. The first requirement—that appellant be faced with imminent and irreparable injury—simply is not present here. As explained in the Lieberman Affidavit, the Committee's investigation of Mr. Mason is in its infancy. (S.A.-8) There have been no charges brought against Mr. Mason and, depending upon the results of the Committee's investigation, there may never be any. (S.A.-8) Moreover, as set out at length in the Lieberman Affidavit, Mr. Mason will have an opportunity at each and every stage of the disciplinary process—before the Chief Counsel's office, before the Committee, and before the Courts—to raise defenses, constitutional or otherwise, to any charges that may be filed against him. (S.A.-7-9) Thus, we cannot help but conclude, this action is but a ruse to prevent Mr. Mason's conduct from ever being investigated by an appropriate disciplinary body.

former Chief Counsel Gentile, Attorney General Abrams and Justice Murphy manifested such bad faith that Mr. Mason now will not be able to obtain a fair and impartial hearing on his disciplinary matter. Even assuming the good faith of Mr. Mason's claim, that standing alone is insufficient to warrant the exercise of federal jurisdiction. *See Kugler*, 421 U.S. at 126-27; *Erdmann*, 458 F.2d 1205. Thus, the sufficiency of Mr. Mason's complaint must be measured by the specific allegations contained therein and whether those allegations, if true, constitute bad faith, harassment or extraordinary circumstances.

1. Bad Faith, Harassment and Extraordinary Circumstances

Petitioner has the burden of showing that one or all of the exceptions apply. It is a heavy burden: "The bad faith exception is narrow and is to be granted parsimoniously." *Hensler* v. *District Four Grievance Comm.*, 790 F.2d 390, 392 (5th Cir. 1986). The complaint alleging bad faith, harassment or extraordinary circumstances must be examined closely for specific facts to support these exceptions and thus the establishment of irreparable harm. In *Collins* v. *County of Kendall*, 807 F.2d 95 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the court declared:

> 'The *Younger* rule, as applied in *Hicks* (v. *Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed. 2d 223 (1975)), requires more than a mere allegation and more than a 'conclusory' finding to bring a case within the harassment exception.'

Id. at 98, (quoting *Grandco Corp.* v. *Rochford*, 536 F.2d 197, 203 (7th Cir. 1976).)

In *Kugler*, this Court stated that bad faith in this context "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 126, n.6; *see also Dombrowski*, 380 U.S. at 482; *Davis*, 851 F.2d at 77. The plaintiff must allege "far more than an 'injury incidental

to every criminal proceeding brought lawfully and in good faith. . . .' " *Dombrowski*, 380 U.S. at 489, 487-89.

2. Petitioner's Claims

Petitioner's allegations fall far short of the above standards. He does not claim that the Committee's investigation of Attorney General Abrams's complaint is part of a long-standing campaign by the Committee to deprive him of his rights. Rather, Mr. Mason now conclusorily alleges a series of acts—

(1) the Attorney General of the State of New York publicly released a ten-page complaint against Mr. Mason charging him with professional misconduct in a highly political, racially sensitive case and called upon the state's Disciplinary Committee to impose disciplinary sanctions;

(2) the Presiding Justice of the Appellate Division of New York, in reaction to the Attorney General's publication, sought to pressure the presumably independent Chief Counsel of the Disciplinary Committee to lodge formal charges immediately against Mr. Mason;

(3) the Chief Counsel of the Disciplinary Committee was subsequently ousted by the Presiding Justice, in part, because of the Presiding Justice's disapproval of his handling of the underlying disciplinary investigation of Mr. Mason;

(4) the former Chief Counsel filed a formal complaint against the Presiding Justice with the State Commission on Judicial Conduct alleging, *inter alia*, that the Presiding Justice improperly interfered with the underlying disciplinary investigation of Mr. Mason;

(5) the Court of Appeals for the State of New York ordered the Appellate Division to investigate the charges;

(6) the independent investigations by the State Commission on Judicial Conduct and the Appellate Division were conducted in secret without providing Mr. Mason or his counsel

an opportunity to confront the evidence or examine the witnesses to determine whether his rights had been violated; and

(7) the Court of Appeals accepted and endorsed the conclusion of the Appellate Division's self-examination that no unethical conduct had occurred without reviewing the underlying evidence on which the conclusion is based;

Petition at 30-32 —acts which, viewed in context, as presented *supra*, at 5-11 and discussed below, in no way exhibit bad faith.

Unlike any of the cases cited by petitioner, in the instant matter, the "undisputed evidence" of bias cited by petitioner does not refer to any actions taken by the Committee, the current Chief Counsel or to anyone who is charged with determining whether any charges should be brought against him. Mr. Mason can point only to the actions of three individuals, Justice Murphy, Mr. Gentile and Mr. Abrams, and to the determinations of the Court of Appeals and the Appellate Division that their acts did not prevent an investigation of his conduct. Mr. Gentile is no longer counsel to the Committee. Attorney General Abrams is not on the Committee and has no connection with the operations or administration of the Committee. Justice Murphy is not involved in the investigation and may never be involved in the matter.

The conduct of the Attorney General cited by petitioner was completely independent of any acts of the Committee.[14] Mr. Gentile's and Justice Murphy's exchange of allegations, with respect to the Mason matter, amounts to no more than Mr. Gentile claiming that Justice Murphy was trying to pressure him to move the

[14] Petitioner totally mischaracterizes the evidence presented when he characterizes the Committee as the "catspaw" of the Attorney General. The uncontroverted evidence below shows that the investigation into Mr. Mason's behavior was initiated because of numerous complaints from many parties, including a letter complaint by five members of the New York State Legislature. (Petition at 55-56.) Moreover, as the Second Circuit points out, the Committee has adopted nothing of what the Attorney General has said, except to ask for a response to his allegations. (A-14.)

matter more quickly than Mr. Gentile believed appropriate. Even if these allegations are true, the lack of progress in the investigation as of the commencement of this action, reveals that it did not result in actual prejudice to Mr. Mason and there is now a new chief counsel. (*See* S.A.-1, 9.)

The Second Circuit succinctly responded to this entire argument when it stated:

> Nor is bias shown by the allegations concerning the resignation of Gentile, the role of Justice Murphy in such resignation, or any state inquiry into such matters. **It is wholly speculative for Mason to conclude that the members of the Committee or its current staff have prejudged him, or are incapable of impartially deciding whether to initiate formal proceedings, and, in that event of conducting them fairly.** Finally, no sufficient claim of bias is shown by the fact that the Committee has rejected Mason's claim of bias, nor by the state court's refusal to halt the Committee's efforts to ascertain whether grounds exist for formal charges. **Obviously state forums do not disable themselves from investigating and adjudicating matters simply by disagreeing with accusations made against them.**

(A-14-5) (emphasis supplied.)[15]

The cases relied upon by petitioner, finding "bad faith," are inapposite to the present situation. In *Bishop* v. *State Bar*, 736 F.2d 292 (5th Cir. 1984), cited at pages 52-55 of the Petition, the plaintiff attorney alleged that the Texas State Bar had prosecuted

---

[15] Petitioner, like the plaintiff in *Smith* v. *Hightower*, discussed *supra*, at 16, n. 12, is fond of relying upon rumor to try to carry his burden. For example, petitioner sets forth as fact a press report that an unnamed source had questioned the vigor of the Appellate Division's review of Justice Murphy's and Mr. Gentile's conduct. (*See* Complaint, ¶ 45 at A-78.) Whether it be regarding the court's inquiry or the Attorney General's motives in filing the complaint against Messrs. Mason and Maddox, petitioner's charges are entirely speculative as is well illustrated by the constant refrain preceding his allegations stating "Published accounts reported . . . ;" "Published accounts further indicated . . . ;" and references to as " . . . described by an unnamed source . . . ." *See* Petition at 20-21.

him in bad faith in successive disciplinary proceedings for almost eight years. He further alleged that the prosecutions themselves suffered from many due process violations. The court, finding the case analogous to *Dombrowski*, apparently also believed that the proceedings were instituted to deter constitutionally protected conduct.

The facts here are very different. There are no allegations that the Committee has engaged in a pattern of patently improper proceedings against Mr. Mason. Nor has Mr. Mason pleaded facts which reflect an effort on the part of the Committee to "chill" Mr. Mason's exercise of his rights. *See Huffman*, 420 U.S. at 601-02; *Younger*, 401 U.S. at 47; *Erdmann*, 458 F.2d at 1211. Mr. Mason simply complains about the manner in which the Committee has thus far conducted its investigation into his conduct related to his representation of the Brawleys. While there may be "costs, anxieties and inconvenience" during this investigation, not only are they those that normally occur when such grave matters are involved, but, as Mr. Mason himself has conceded, he is obligated, as a member of the bar, to cooperate in the investigation. (*See* J.A.II-16.)

Moreover, Mr. Mason, continues to practice and has been afforded an opportunity to respond to the charges made against him. Further, the Committee and the courts stand ready to consider Mr. Mason's constitutional concerns. Finally, far from expressing hostility to Mr. Mason, the Appellate Division already has ruled against the Committee in the state proceeding regarding Mr. Mason's right to withdraw the response submitted by Mr. Williams and to have additional time to submit another.

Wichert v. *Walter*, 606 F. Supp. 1516 (D.N.J. 1985), cited at pages 25 and 27 of the Petition, also does not advance Mr. Mason's charge of bias against the Committee. There, a school teacher sought to enjoin a tenure revocation proceeding commenced against him. The teacher claimed that he was the subject of a disciplinary proceeding because he had participated in a po-

litical rally in opposition to the political party which controlled the school board. The teacher's unrebutted affidavit set forth a pattern of political actions taken against members of his political group. Furthermore, the record failed to indicate a legitimate basis for the charges against the teacher, prompting the court to find them "patently meritless." *Id.* at 1522.

Again, that situation is plainly distinguishable from the case at bar. The allegations made by Attorney General Abrams (and others) are quite specific and detailed, referencing not only specific behavior and language but also particular rules which were purportedly violated. Thus, it certainly cannot be said that the charges are patently meritless or that they were brought with " 'no genuine expectation' of their eventual success, but only to discourage the exercise of the appellant's protected rights." *Id.* at 1521. Moreover, there are no allegations that Attorney General Abrams, or, for that matter, the Committee or the state judiciary, has been engaged in a pattern of conduct to deprive civil rights activists like Mr. Mason of their constitutional rights.

Kugler v. *Helfant*, 421 U.S. 117 (1975), practically ignored by petitioner, is far more relevant to the disposition of the instant matter. There, this Court considered a claim analogous to Mr. Mason's that the plaintiff, a municipal court judge, could not obtain a fair hearing in a criminal matter because the state prosecutors and the Court had conspired to deprive him of his rights.

In *Kugler*, the state judge had been called to testify before a grand jury investigating his activities while he was on the bench. During his testimony, he invoked his Fifth Amendment rights against self-incrimination. He subsequently was recalled to testify before the grand jury. The day before this was to occur he was called to meet with the Chief Justice as well as the other Justices of the New Jersey Supreme Court. There followed a meeting in which it was suggested that it was inappropriate for a sitting judge to invoke his Fifth Amendment privileges before a grand jury and that a disciplinary investigation might be in order. The next day

the judge testified before the grand jury and did not exercise his Fifth Amendment rights. Shortly thereafter, the grand jury issued a state indictment against the judge for obstruction of justice and false swearing.

In his federal complaint seeking relief under 42 U.S.C. § 1983, the judge alleged that he had been coerced into giving his testimony by a concerted effort of the assistant attorney general and the members of the Supreme Court of New Jersey. Due to this improper activity, he alleged, it would be impossible for him to receive a fair hearing on his federal constitutional claims in the New Jersey courts, particularly if convicted, when the very same Supreme Court that he contended acted to deprive him of his rights would be called upon to review the matter. *See id.* at 122. He claimed that these facts established bad faith and created the extraordinary circumstances which allowed the exercise of federal jurisdiction under *Younger*.

This Court rejected these arguments, ones far more substantial than those at bar. While recognizing that the New Jersey Supreme Court (and particularly the Chief Justice) exercised considerable administrative authority over the entire judicial system in New Jersey, the Court stated that the objectivity of the entire New Jersey court system could not be impugned because of the pleaded actions. First, the Court pointed out, an affected judge could recuse himself. Second, absent recusal, the plaintiff could seek to have the judge disqualified. *Id.* at 127. Finally, the Court noted that several members of the State Supreme Court who had met with the plaintiff were no longer on the bench, thus mitigating any taint that may have arisen.

Here, too, the Committee's former Chief Counsel, who allegedly had conspired against Mr. Mason, no longer is in office; instead, a new Chief Counsel—one who has not been accused by plaintiff of any wrongdoing—is in charge of the investigation. Further, if a proceeding is brought against Mr. Mason and is referred to the Appellate Division, Mr. Mason would have the right

to seek the recusal of any justice that he believed lacked partiality. Thus, under *Kugler*, the instant complaint was appropriately dismissed. *Accord Erdman*, 458 F.2d at 1207, 1210-12 (plaintiff lawyer had called state judges "whores" and "madams"; Second Circuit dismissed federal action brought under the civil rights statutes to enjoin state disciplinary proceeding, finding plaintiff's "conclusory charges" of inability to obtain a fair hearing in state court system insufficient under *Younger* to withstand abstention).

C. There Was No Need For An Evidentiary Hearing

Finally, Mr. Mason contends that the court below erred in at least not holding an evidentiary hearing. However, as Judge Sprizzo and the Second Circuit recognized, the Committee, tnough only for purposes of the motion for a preliminary injunction, assumed that the material factual allegations in the verified complaint were correct. Thus, there were no material issues of fact in dispute to warrant an evidentiary hearing, though, as would be expected, the parties differed as to the reasonable conclusions to be drawn from petitioner's statement of the facts. Accordingly, an evidentiary hearing was properly regarded as unnecessary by the courts below.

CONCLUSION

The proceedings against Mr. Mason are still at the investigatory stage. The Committee has not brought formal charges against petitioner. A denial of certiorari, therefore, will not terminate the matter: the Committee will continue its investigation and if no charges are warranted, the matter will be concluded; if charges are brought, a disciplinary proceeding with full due process protections will follow.

Furthermore, petitioner's complaint does not allege a sufficient basis either to establish bad faith or harassment by the Committee or to impugn the integrity of the entire State judicial system. Thus, the Second Circuit correctly affirmed the decision of the district court which determined that the complaint failed to meet the stringent standards established by this Court in *Younger*

and *Middlesex*, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Respondents
Seven Hanover Square
New York, New York 10004
(212) 806-5400

JAMES G. GREILSHEIMER
Counsel of Record

ALAN M. KLINGER
JOSEPH J. GIAMBOI
Of Counsel

June 11, 1990

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. VERNON MASON,

Plaintiff,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; Office of Chief Counsel,

Defendants.

89 Civ. 3598 (JES)

AFFIDAVIT

STATE OF NEW YORK)
: ss. :
COUNTY OF NEW YORK)

HAL R. LIEBERMAN, being duly sworn, deposes and says:

1. I am Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department (the "Committee"), having been appointed to said position effective May 15, 1989. On January 9, 1989, I became Acting Chief Counsel upon the resignation of the former Chief Counsel, Michael A. Gentile. I joined the Office of Chief Counsel to the Committee in June, 1987 as Principal Attorney. Prior to my appointment by the Committee, I have held various public interest legal positions for the past twenty years, including service as a staff attorney, managing attorney and project director for three legal services agencies, as as-

sociate appellate counsel in the criminal appeals bureau of the Legal Aid Society of New York, and, between 1983—1987, as a senior litigation attorney with the Office of the Bar Counsel for the Supreme Judicial Court of the Commonwealth of Massachusetts, the equivalent of the Committee in the First Department. I currently hold the title of Adjunct Professor of Law at Brooklyn Law School and New York Law School where I teach "Professional Responsibility."

2. I offer this affidavit not to contest the many conclusory charges made in plaintiff's papers (though I believe them to be insupportable), but to explain the workings of the attorney disciplinary process in the First Department. Once the proceedings and practices of the Committee are properly understood, it is my belief that the Court, in considering the facts pleaded by plaintiff, will see that plaintiff has failed even to approach the showing required of him to fall within any of the limited exceptions to the *Younger/Middlesex* mandate of abstention.

3. Under § 90(2) of the New York Judiciary Law, the Appellate Division of each judicial department in New York is given the exclusive power to hear and resolve charges of attorney misconduct pertaining to attorneys practicing within the department. The Appellate Division, First Department, appoints a Committee which is charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys and to impose non-public discipline as appropriate. The Committee is made up of 36 persons, each of whom is appointed by the First Department for a term of three years and two-thirds of whom are attorneys. Appointments to the Committee are made by the Court based upon lists of nominees furnished by various bar associations and other sources.

4. The Appellate Division, First Department, in consultation with the Committee, appoints a Chief Counsel to the Committee. (*See* 22 NYCRR § 603.4). The First Department also has promulgated the Rules and Procedures of the Committee

(Part 605 of 22 NYCRR) which rules govern the conduct of disciplinary proceedings (the "DDC Rules"). In reviewing below the procedures prescribed therein and the attendant practices of the Committee, the Court will be able to see that the rights of C. Vernon Mason, Esq. have not been abridged in the limited developments to date and would in the future be adequately protected through this process.

5. Pursuant to the DDC Rules, the Office of Chief Counsel is empowered to undertake an investigation of all matters involving alleged misconduct of attorneys within the First Department. (*See* 22 NYCRR § 605.6). Investigations of professional misconduct may be commenced upon receipt of a specific complaint by the Committee or the Court, or may be commenced *sua sponte* by the Committee or the Court. (*See* 22 NYCRR § 603.4(c)). In this case, by virtue of the numerous media reports and inquiries regarding the conduct of Mr. Mason in connection with the Tawana Brawley matter, the Committee, in June of 1988, *sua sponte* opened a file for investigation. I first became involved in the Mason investigation and reviewed the file when I became Acting Chief Counsel in January, 1989.

6. Once a file has been opened, the Chief Counsel, pursuant to section 605.6(c), is authorized to make "such investigation of each Complaint as may be appropriate." It is standard practice, as part of an investigation, to contact other prosecutorial agencies, state and/or federal, to elicit information about the subject of the misconduct charges, assuming, of course, that the particular agency would be likely to have information relevant to our investigation that is not under seal. The transmittal of the June 28, 1988 letter from Mr. Gentile, former Chief Counsel to the Committee, to Attorney General Robert Abrams, about which plaintiff makes much ado, was well within the norm of routine practice.

7. That the June 28, 1988 letter was designated "PERSONAL AND CONFIDENTIAL," as to which plaintiff insinuates some form of conspiratorial motive (*see* Complaint, ¶ 21, at

9), again is a standard procedure. I note that counsel for plaintiff themselves, in communicating with the Committee, have adopted the same convention. (*See, e.g.*, Plaintiff's Appendix ("A"), at 000092, 000143).

8. Where the attorney in question is involved in parallel proceedings, particularly of a criminal nature, it is also common for this Office to defer an investigation until the completion of those proceedings, and our rules provide for such deferral as a matter of discretion in appropriate circumstances. (*See* 22 NYCRR § 605.9(b)(1)). Here, then, it was by no means out of the ordinary for Mr. Gentile to indicate in the same letter to Attorney General Abrams that this Office would "await outcome of the grand jury's inquiry before proceeding further."

9. According to media reports, with the conclusion of the Brawley grand jury's inquiry, and in fact at a press conference disclosing the grand jury's findings, Attorney General Abrams announced that in connection with those findings he was forwarding allegations of professional misconduct against Mr. Mason (and Alton H. Maddox, Jr., Esq.) to the appropriate disciplinary bodies. At the same conference he also distributed copies of a letter setting forth in detail the nature of his allegations. This ten-page letter, dated October 6, 1988, was, after review by our staff, forwarded to Mr. Mason on October 14, 1988 for response within the 20-day period provided by section 605.6 of the DDC Rules.

10. Plaintiff charges that Attorney General Abrams's publication of his allegations was wrongful and that the Committee acted improperly in utilizing the October 6, 1988 letter of complaint as the vehicle to notify Mr. Mason of the allegations brought against him and as to which he should respond. (*See* Complaint, ¶¶ 12, 13, 20, 53-54, 57, 62, 64 and 66).

11. First, with respect to whether the Attorney General acted improperly in publicly announcing and disseminating allegations against Mr. Mason, that issue has no bearing on whether there has been or will be any Committee or judicial bias or unfair-

ness. Attorney General Abrams is not a member of the Committee, he has no connection with the operations or administration of this Office, and he is not a Justice of the Appellate Division. Mr. Mason has, in fact, filed a cross complaint with the Committee against the Attorney General, which complaint alleges that the latter's conduct was violative of the Disciplinary Rules of the Code of Professional Responsibility. But whatever the outcome of our investigation of Mr. Mason's complaint against Attorney General Abrams, the propriety of the Attorney General's conduct simply is irrelevant to the question whether Mr. Mason may obtain fair treatment or an impartial hearing before the Committee or the Appellate Division if formal charges are preferred against Mr. Mason. (It is noteworthy that despite Mr. Mason's protest of the Attorney General's actions in publicizing his complaint against Mr. Mason, Mr. Mason himself, in January, 1989, publicly announced that he had filed a complaint with the Committee regarding the impropriety of the Attorney General's actions.)

12. Second, the Committee acted in accordance with standard procedure in forwarding Attorney General Abrams's letter to Mr. Mason for his review and response. Section 605.6 of the DDC Rules allows the Office of Chief Counsel to formulate and transmit to the respondent attorney its own list of allegations or to forward allegations prepared by members of the public (former clients, other attorneys, judges). Our staff, in fact, is permitted to assist people who have difficulty in drafting their grievances. (*Id.*). Here, Attorney General Abrams's formulation was detailed as to the incidents in question and specific as to the Disciplinary Rules that such conduct assertedly violated. The Committee had previously received a much more general recitation of alleged wrongful conduct from a group of State legislators (*see* A 000236-37). Upon review, it was apparently determined that the Attorney General's more thorough account of alleged wrongful

conduct made an appropriate vehicle for consideration and response by Mr. Mason.[16]

13. As indicated below, plaintiff was allowed to withdraw his first response to the complaint forwarded to him and has as yet not filed a new one. (As the time for his response and deposition before the Committee drew near, Mr. Mason instituted the present action. The Committee has stipulated with plaintiff's counsel that, pending this Court's determination of the instant motion, plaintiff's response and appearance would be deferred.) Consequently, the Committee is still in its investigatory phase regarding the allegations brought against Mr. Mason and no determination has been made whether or not to file formal charges against him.

14. If, upon completion of the investigation of Mr. Mason (assuming that such investigation is not enjoined), the Office of Chief Counsel believes that a cautionary warning or some level of discipline is appropriate—letter of admonition or formal charges—that recommendation would be made to the Committee Chairperson and that person or a Committee member designated by him (the "Reviewing Member") would review the recommendation. (*See* 22 NYCRR § 605.6(e)&(f)). The Reviewing Member has the right to modify the recommendation, if appropriate, and any dispute that might result between the Reviewing Member and the Chief Counsel regarding such a modification, if not resolved, is referred to the Committee Chairperson for disposition. (*See* 22 NYCRR § 605.7). If the decision reached after initial review is

[16] That plaintiff continues to make the claim that the Committee's initial denial of an extension of the standard 20-day period to respond to the Attorney General's allegations (*see* 22 NYCRR §605.6(d)(2)) is indicative of bad faith or harassment (see Complaint ¶¶ 14-18) is surprising. First, plaintiff neglects to inform the Court that the denial was prompted, in large part, by the equivocal nature of the applicants' (not Mr. Mason's) authority to make the request. (*See* A 000129). Second, plaintiff was *ipso facto* granted additional time to respond by the Committee's affording him until January 9, 1989 to file supplemental material to the response purportedly filed on his behalf on the November 4, 1988 due date. Finally, the Appellate Division, First Department, granted Mr. Mason's first Article 78 petition allowing him to withdraw his first response and granting additional time to submit another.

to file formal charges, then the Office of Chief Counsel must, before charges can be filed, take the further step of obtaining written approval of an attorney member of the Committee's Policy Committee, a procedure which became effective on or about March 1, 1989. (The Policy Committee is comprised of seven Committee members, plus the Committee Chair, of whom five are attorneys).

15. If formal proceedings are approved at this level, then proceedings are commenced by the service of a Notice and Statement of Charges in a format prescribed by section 605.12 of the DDC Rules. Pursuant to that provision, the respondent attorney has the opportunity to answer the statement of charges and, in so doing, may raise any matters by way of defense or in mitigation thereof, or any constitutional objections to them. Following any pre-hearing stipulation, one of four Hearing Panels composed of Committees members (five lawyers, two lay members, though not to include the Reviewing Member or the complainant if a member of the Committee) is designated by the Chairperson to conduct the proceeding. The respondent attorney has the opportunity to raise objections to the participation of any designated panel member. (*See* 22 NYCRR §§ 605.12 & .13).

16. During the formal hearing, each party has the opportunity to make opening and closing statements, subpoena witnesses, and to present and object to evidence. A record is made of the entire proceeding. (*See* 22 NYCRR § 605.13).

17. Once the record is complete, the Hearing Panel decides whether the charges have been sustained. If sustained, the Hearing Panel recommends an appropriate sanction, the possibilities of which are: (i) private reprimand, (ii) referral to the Court, with a recommendation as to censure, suspension or disbarment, if deemed appropriate, and (iii) reprimand with referral to the Court, with a recommendation as to censure, suspension or disbarment, if deemed appropriate. The Hearing Panel thereupon

advises the parties of the determination. (*See* 22 NYCRR § 605.14(a)).

18. If a Hearing Panel refers a matter to the Court, this Office delivers to the respondent attorney proposed Findings of Fact and Conclusions of Law. The respondent attorney may submit counter proposed Findings and Conclusions. Conflicts between the two are resolved, in the first instance, by a designated member of the Hearing Panel. The Hearing Panel also may issue an Opinion. Once all this material is prepared, the papers are circulated to the entire Hearing Panel for final determination and issuance of a Hearing Panel Report. Briefs from the parties may be requested and reviewed in connection with the issuance of the Report, which, once finalized, is filed with this Office and served upon the respondent attorney. (*See* 22 NYCRR § 605.14(c)-(f)).

19. Whenever a Hearing Panel determines that a respondent attorney should be publicly disciplined, and a referral made, the Hearing Panel Report, the transcript and the documentary evidence are forwarded to the Appellate Division, First Department. (*See* 22 NYCRR § 605.15(e)). A regular panel of the First Department (five Justices) receives and reviews the entire record of the proceeding, as well as any petitions, cross-petitions and papers submitted in support thereof filed with it. Constitutional arguments may, of course, be addressed to the First Department and, upon compliance with section 5601 of the Civil Practice Law and Rules, to the Court of Appeals. Failing satisfaction there, a petition for certiorari may be filed to the United States Supreme Court.

20. Thus, as may be gleaned from the above, the proceedings against Mr. Mason are only in their infancy and may never move beyond the investigative stage. Moreover, Mr. Mason will have every opportunity to raise in the several levels of the state proceedings (should the matter proceed) the First Amendment and Civil Rights issues set forth in his federal complaint. Furthermore, because no determination whether to formally charge Mr.

Mason has been made—we are but in the initial investigatory stage—any pressure that Mr. Gentile perceived to move this matter along certainly will not have prejudiced me or my Office's present handling of the investigation.

21. Accordingly, it is respectfully submitted that plaintiff's motion for a preliminary injunction be denied and the instant complaint be dismissed.

/s/ Hal R. Lieberman

HAL R. LIEBERMAN

Sworn to before me this
20th day of June, 1989

/s/

Notary Public

(3)

No. 89-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

C. VERNON MASON,

Petitioner,

—v.—

Departmental Disciplinary Committee, Appellate Division of the Supreme Court of the State of New York, First Judicial Department; Office of Chief Counsel,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephanie Y. Moore
666 Broadway, 7th Fl.
New York, New York 10012
(212) 614-6464

William M. Kunstler*
Ronald L. Kuby
13 Gay Street
New York, New York 10014
(212) 924-5661

* *Counsel of Record for Petitioner*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

No. 89-1752

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

C. VERNON MASON,

Petitioner,

- v. -

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; OFFICE OF CHIEF COUNSEL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

PETITIONER'S REPLY IN SUPPORT OF A WRIT OF CERTIORARI

This reply responds to several contentions advanced by respondents.

ARGUMENT

I. Preliminary Statement

At several junctures in Respondents'

Brief in Opposition to Petition for a Writ of Certiorari ("Opposition"), respondents deliberately misstate the facts and distort petitioner's claims. First, petitioner's claim of bias is not limited to the alleged isolated acts of three individuals. Although the known overt acts of Attorney General Abrams, Presiding Justice Murphy and former Chief Counsel Gentile constitute the foundation of petitioner's claim, they do not constitute the sole basis for his claim. Specifically, (1) the participation of all Appellate Justices -- before whom all interim motions in the underlying disciplinary investigation are heard[1] -- in the exoneration of Justice Murphy on charges

---

[1]Since the filing of petitioner's § 1983 lawsuit, the Appellate Division has denied two interim motions by petitioner. The first sought change of venue from the First Department, M-5641 (App.Div. Nov. 20, 1990); the second sought to open the proceedings to the public. M-6623 (App.Div. Mar. 7, 1990).

that he improperly interfered in the underlying investigation of petitioner; (2) the submission of a letter in support of Justice Murphy to the Appellate Justices by the current chairman of the Disciplinary Committee, William E. Jackson, see A-73[2]; (3) the reported statements by DDC staff and committee members regarding the likelihood of petitioner receiving a fair hearing[3], see, e.g., J.A.I-320; the intervention of the

---

[2]Citations preceded by "A" refer to the Appendix to the Petition; those preceded by "J.A.", as in respondents' Opposition refer to the three volume appendix of the Record on Appeal filed in the Second Circuit; those preceded by "S.A." refer to the Supplemental Appendix to the Opposition.

[3]Ironically, while declaring that the underlying disciplinary investigation of petitioner commenced "as a result of a flood of newspaper articles, television news reports and radio broadcasts about the controversy surrounding the Grand Jury investigation," Opposition at 6, respondents characterize petitioner's charges as "entirely speculative" based upon his reference to similar, if not more reputable, media sources. See Opposition at 20 n.15.

Court of Appeals, and (5) the actions of the staff of the disciplinary committee and the Office of the Chief Counsel thus far in these proceedings[4], among others, are all factors undergirding petitioner's claim that, at minimum, an unconstitutional risk of bias exists on this record.

Second, respondents understandably mischaracterize the content of former Chief Counsel Gentile's letter to the Attorney General during the pendency of the Brawley grand jury as "requesting the production of relevant materials and documents for possible action following the conclusion of

---

[4]For example, notwithstanding that 22 NYCRR § 603.5 clearly confers upon both "an attorney under . . . investigation," and/or one "who is a party to [formal] proceedings," the right to examine witnesses under oath, the Deputy Counsel to the DDC has repeatedly advised counsel to Petitioner that his Office recognizes no such right during the investigatory stages and will oppose the issuance of any subpoenas.

the Grand Jury's investigation." Opposition at 6. The letter, however, clearly requests immediate receipt of "evidentiary materials presently available," and, at the conclusion of the investigation "all other relevant material." A-43, 44 (emphasis added). The distinction is significant for two reasons: (1) state law prohibits the disclosure of grand jury materials absent application to the court, and (2) there are two know instances of violations of that law by the Attorney General's office in connection with the Brawley investigation, one prior to Gentile's request and one after.[5]

---

[5]After the Attorney General was appointed as special prosecutor to the Brawley grand jury, an employee in his office was arrested and charged with stealing the transcripts of the first grand jury convened to consider Ms. Brawley's charges. J.A.II-330. In September 1988, prior to the release of the official Grand Jury report, grand jury materials were leaked to the New York Times, which published a summary of the findings based

Finally, citing no independent sources, respondents flatly mislead this Court in stating that Petitioner publicized his disciplinary complaint against the Attorney General. Opposition at 8 n.6. The fact that petitioner filed a complaint against the Attorney General, as was acknowledged by the Second Circuit during oral argument, became part of the public record, not via a press conference, but, instead by virtue of Petitioner's Article 78 proceeding seeking judicial relief. See J.A.I.-242 & n.1. Respondents persist in this blatant misstatement in an effort to discredit petitioner and the substance of his due

---

upon the illegally obtained information. Although an investigation was allegedly conducted, the culprit was never identified and charges were never preferred. See J.A.III-89, 90; J.A. I.-391-93.

process claim.[6] As is further demonstrated below, however, there exist an impermissible risk of bias on this record barring application of Younger abstention.

II. Respondent DDC is Disabled By Reason of Bias to Investigate and/or Adjudicate Allegations of Misconduct Against Petitioner

Elemental concepts of due process dictate that "Petitioner is entitled to a neutral and detached [tribunal] in the first instance." Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972).[7] Moreover, the consistent teachings of this Court have

---

[6]Additional distortions appear throughout respondents' opposition. See, e.g., Opposition at 7 (omissions of fact regarding Ms. Moore's prior representation of petitioner); id. at 14 n.10 (fabrication of claim never made by petitioner). Petitioner has referenced those that bear more heavily on his claims.

[7]See also In Re Murchinson, 349 U.S. 133, 136 (1955) ("a fair trial in a fair tribunal is a basic requirement of due process").

further reaffirmed that "our system of law has always endeavored to prevent even the probability of unfairness." In Re Murchinson, 349 U.S. 133, 136 (1955).[8] To

---

[8]See, e.g., Hortonville J.D.S. No. 1 v. Hortonville Ed., 426 U.S. 482 (1976) (school board hearing) Withrow v. Larkin, 421 U.S. 35 (1975) (physician revocation hearing); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (criminal contempt hearing); Tumey v. Ohio, 273 U.S. 510 (1927) (criminal conviction for possession of intoxicating liquor).

Although none of these cases involved determinations regarding the propriety of federal intervention, they are instructive on the issue of what constitutes an unconstitutional risk of bias. While Tumey and Mayberry found pecuniary and personal factors warranting disqualification, this Court found no such disqualifying interests in Hortonville and Withrow. The holdings in the latter two cases rest upon a related proposition, viz., mere familiarity with the contested issues, legitimately acquired, does not, in itself, constitute a due process violation. The operative words of the Withrow/Hortonville decisions are underscored. The factual allegations on this record, however, are far more akin to the exception noted in Withrow:

> Clearly, if the initial view of the facts based on the evidence

this end, this Court has held that even where proof of actual bias is lacking, a tribunal may nonetheless be constitutionally disabled to investigate or adjudicate claims where "in the natural course of events, there is an indication of possible temptation to an average man . . . to try the case with bias." Gibson v. Berryhill, 411 U.S. 564, 571 (1973). Accordingly, a tribunal must be disqualified where there exists a personal or institutional interest in the outcome of the dispute, id., or where other factors preventing fair and impartial adjudication are present. Younger v.

> derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

421 U.S. at 58.

Harris, 401 U.S. 37, 49 (1971).[9]

Respondents do little to more than refer to the determination of the Second Circuit in response to petitioner's claims of bias.[10] See Opposition at 16. Similarly,

---

[9]Cf. Middlesex County Ethics Comm. v. Garden State Bar Assn, 457 U.S. 423, 433 (1982) (holding abstention doctrine inapplicable where adequate opportunity to raise constitutional claims in state proceedings is lacking); Kugler v. Helfant, 421 U.S. 117 (1975) (acknowledging disqualifying factor where contested claims have been prejudged).

[10]Respondents maintain that Petitioner faces no irreparable harm because of the infancy of these proceedings. Submission of his claims to an biased tribunal is itself irreparable injury. United Church of the Medical Center v. Medical Center Comm'm, 689 F.2d 693, 701 (7th Cir. 1982). In addition, the sanction of suspension from the practice of law may be imposed during the investigatory stages. See Court Rules for the Supreme Court, Appellate Division, First Department § 603.4(e)(1). Pursuant to similar rules in the Second Department, Alton H. Maddox, Esq., was indefinitely suspended, without a hearing, by order dated May 21, 1990 in connection with Attorney General's complaint. See Matter of Alton H. Maddox, N.Y.L.J., May 22, 1990, at 6, col. 3 (App.Div.2d Dep't).

the Affidavit of Chief Counsel Lieberman merely recites the procedural rules that allegedly govern lawyer disciplinary proceedings for the First Department. In that regard, respondents suggestion that Justice Murphy's interference "to pressure [Mr. Gentile] to move the matter more quickly" was harmless, overlooks the authority of the Chief Counsel, pursuant to 22 NYCRR § 605.6(d)(2) to discontinue an investigation "where it appears that there is no basis for proceeding further."[11] Accordingly, Justice Murphy's interference was substantial and his subsequent

---

[11]Petitioner has appeared before the Committee on several occasions to entertain questions concerning matters clearly protected by the attorney-client privilege. Moreover, intrusive, harassing inquiries into the foundation for petitioner's criticisms protected by the First Amendment have been made. The respondents "investigation" of such baseless claims is intended to harass petitioner and infringe upon his First Amendment liberties.

exoneration in a "star chamber" proceeding by all of the remaining Justices of the Appellate Division, as well as, on information and belief, committee and staff witnesses cannot survive the strictures of due process.

Kugler v. Helfant, 421 U.S. 117 (1975), upon which respondents principally rely is plainly distinguishable from the case at bar. First, in Kugler the petitioner failed to meet the first requirement under Younger, viz., that the litigant first "set up and rely upon his defense in the state courts." 401 U.S. at 45. Second, the conditional nature of Mr. Mason's right under the rules and procedures of the DDC to exercise a formal challenge to the Committee or any of its members on the basis of bias places his claims squarely within the Younger/Middlesex abstention exception. In Kugler, New Jersey

law imposed upon individual judges, including the trial judges (before one of whom Helfant would appear), mandatory disqualification where any reason would actually preclude a fair judgment or would appear to do so. 421 U.S. at 127-28. Conversely, here the burden of seeking disqualification of a suspected biased Committee member rests squarely upon the shoulders of the accused. Moreover, the right to seek disqualification, by respondents own admission, does not attach until the proceedings have progressed to the formal proceeding stage and a hearing panel has been selected. There is no procedure, no expressed policy, for disqualification, compelled or voluntary, during the investigatory stages. Moreover, following objections by the accused attorney, "unless [the challenged] . . . member voluntarily

withdraws from the proceedings," the hearing panel shall make a ruling on the objection "and such determination by the hearing panel shall be final." 22 NYCRR § 605.13(d). Thus, in the absence of objections by the accused attorney or staff counsel, there exist no independent obligation which mandates sua sponte recusals where injustice or the appearance thereof is likely. Far from the procedures available in Kugler, these procedural "safeguards" are clearly inadequate to redress the constitutional violations petitioner alleges.[12]

---

[12] Kugler is further distinguishable. Although Helfant insinuated bias at the trial level, his chief claim of bias was aimed at the appellate level of the New Jersey Supreme Court. Here, however, petitioner charge of bias lies, in the first instance, with the initial finders of fact -- defendant Disciplinary Committee. Moreover, Justice Murphy remains on the bench with all of the administrative and statutory powers and responsibilities of the presiding justice, including the authority under Judiciary Law § 44(10) to receive and

Kugler is further distinguishable in that Judge Helfant sought to enjoin proceedings based upon the alleged improper conduct by his colleagues. Here, petitioner sought an injunction based upon the allegedly improper conduct of adversaries. Moreover, the judge was fully aware of the challenged actions of his colleagues; indeed, they presented their views directly to him. Finally, the testimony that gave rise to the indictments against the judge, was presented to an independent grand jury.

Once exposed, the propriety of clandestine acts have been resolved in non-adversarial, secret proceedings. The actors are those who would now contend that they have no disabling interest in adhering to decisions already made. Such a contention

---

act upon complaints referred by the State Commission on Judicial Conduct.

is untenable. The courts below have essentially ignored the facts and permitted official misconduct to hide behind a cloak of secrecy.[13] Neither Younger nor its progeny dictate such a result that the Constitution forbids.

Long ago, Justice Brandeis, in a now oft-cited passage, observed the necessary prerequisites for the legitimate exercise of the governmental function:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled

---

[13]Contrary to respondents' suggestion, any legitimate allegations of professional misconduct against petitioner will not be insulated from review by the rightful assumption of federal jurisdiction. Success on the merits of petitioner's First Department bias claim would merely remove the investigation and adjudication of the underlying disciplinary proceeding, and petitioner's defenses thereto, from within its jurisdiction.

> if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the government becomes a law unto itself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The various state proceedings in the aftermath of the grand jury investigation into the disappearance of Tawana Brawley -- indeed, that investigation itself -- have left the public lacking confidence in the integrity of the state judicial process. A full and objective investigation by this Court can only enhance the public interest by assuring that petitioner's due process rights are protected and that the right to political speech in New York State is restored.

CONCLUSION

For the reasons stated herein and on the record of these proceedings, this Court

should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Stephanie Y. Moore
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

*William M. Kunstler
Ronald L. Kuby
13 Gay Street
New York, New York 10014
(212) 924-5661

* Counsel of Record
for Petitioner

Dated: June 18, 1990